Volume I.] *December, 1886.* [*Number 4.*

POLITICAL SCIENCE QUARTERLY.

THE FUTURE OF BANKING IN THE UNITED STATES.

ON the 13th of July last, the Hon. A. J. Warner, of Ohio, offered an amendment to the so-called surplus resolution then pending in the House. The amendment was in these words:

> *Provided*, that after the passage of this Act, whenever and as fast as the circulating notes of national banks are redeemed or cancelled, as provided by the Act of June 3, 1864, and amendments thereto, the Secretary of the Treasury shall cause to be issued in place of such bank notes redeemed, dollar for dollar, United States notes in denominations as nearly as may be of the bank notes redeemed, and all laws applicable to bank notes now in circulation are hereby made applicable to the notes issued under this Act.

A critical examination of Mr. Warner's speech in support of his amendment does not reveal any definition of the phrase "issuing." The issuing of a note is an act of borrowing money. But, in the case before us, the borrower already has more money than he requires. The whole argument in favor of the surplus resolution, including Mr. Warner's speech, started from the text that the government has too much money now. The surplus resolution was a device to get rid of some part of it. The belief was that the government would be able to pay all the outstanding three per cents within the current fiscal year. Three-fourths of these bonds are lodged in the Treasury by national banks, as security for their circulation. Mr. Warner proposes that when the government pays this portion of its debt, say $75,000,000, it shall forthwith borrow $75,000,000

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

more. For what purpose? There is no other debt that it can pay off at par before the year 1891. It can then pay off $250,000,000; but it will have collected in the interim much more than that sum, unless its receipts are greatly curtailed or its expenses enormously increased. It is hardly possible to imagine a scale of expenditure sufficient to swallow up the current revenues of the next four years. Even the most rampant scheme of coast fortification and naval expenditure will fall short of the needs of the hour. What is to be done then with the $75,000,000 that Mr. Warner thinks of borrowing now, and the $200,000,000 or more that he contemplates borrowing when his plan shall have worked itself out?

Before advancing to the main discussion assigned to this article, let us glance at the process by which bonds, owned by the banks and held by the Treasurer of the United States as security for their circulating notes, are retired. A call for bonds to be redeemed and cancelled is made by the Secretary of the Treasury, maturing in, say, ninety days. A certain large proportion of them are these security bonds already in the Treasury. The bank cannot turn over the bonds for cancellation and receive the money for them, until it shall have retired its circulating notes or made provision for redeeming them. The notes being in the hands of the people, here, there, and everywhere, the bank cannot gather them in readily, but it can deposit "lawful money" in the Treasury to redeem them with, and then give itself no more concern about them.

Now, let us suppose that the government has $100,000 of "surplus," and has called in $100,000 of bonds owned by bank A, upon which $90,000 of notes have been issued. Bank A perceives that the easiest way to transact the business is to tell the Treasurer of the United States to help himself to $90,000 of the money (to redeem the outstanding notes with), and to remit the balance, $10,000, to bank A. It is optional with the bank to do this, or to buy other bonds at various rates of premium to put in the place of the called bonds. But there is no pecuniary inducement to do so, and in any case the diffi-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

culty is only adjourned a few years, for the time is hastening when all the bonds will have been called.[1]

Now it needs no prophet to foretell that Mr. Warner's resolution will be heard of again, and very soon. The question, what shall take the place of the national bank notes, is likely to be the burning one of the next few years. The notes are gradually disappearing; and they will go at an accelerating rate, since the premium on the long bonds is not only an obstacle to their substitution for the short ones, but is an inducement to the bankers to sell such as they already have and go out of the business of note circulation.[2] It should be mentioned in passing that one clause of the national banking law requires all banks, whether they issue notes or not, to hold a certain amount of bonds at all times — no bank, however, being required to hold more than $50,000. This provision of law does not concern the present discussion. It is referred to because we are told sometimes that there will be bonds sufficient to keep the national banking system going for twenty years at all events, meaning that this particular clause of the

[1] A brief calculation will show that there is a loss in buying 4 per cent bonds to issue circulating notes upon. Suppose a bank buys $100,000 of these bonds at 130 and receives 90 per cent of the par value in circulating notes. Suppose that it is able to realize 6 per cent per annum continuously on its loans and discounts. Then by taking out notes it can realize annually:

On $100,000 bonds		$4,000
On bank notes	$90,000	
Less 5 per cent redemption fund	4,500	
	$85,500	5,130
		$9,130
Less shrinkage in premium on bonds ($30,000 in 20 years), $1,500		
Tax on circulation 1 per cent	900	2,400
		$6,730
Against 6 per cent interest on $130,000 cash		7,800
Difference against circulation		$1,070

When the rate of interest obtainable on loans is 5 per cent, the figures stand $5,875 annual profit on taking out circulating notes, and $6,500 on not doing so. At 4 per cent, they are $5,020 and $5,200 respectively.

[2] The progressive decline in the bank circulation is shown in the monthly circulars of the Comptroller of the Currency. That of October 1, 1886, is as follows:

STATEMENT of the Comptroller of the Currency on October 1, 1886, showing the amounts of National Bank Notes and of Legal Tender Notes outstanding at the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

law, which has hitherto been a *sine qua non* of every bank charter, can be complied with as long as $100,000,000 of bonds of any class are to be had. This has nothing to do with bank circulation. Congress might repeal this clause of the law without altering any fact now material to the banks or to the government. It was originally put in the law in order to improve the market for the bonds. There is no lack of a market now. Indeed, for banking purposes there is rather too much. The portion of the law which concerns us is the provision that every bank note issued shall be secured at the rate of 110 per cent, par value, of United States bonds deposited with the Treasurer at Washington City. It is this provision which makes the national banking system, in popular phrase, and truly, I think, "the best banking system the world ever saw." It is this provision, or rather the inability to comply with it, that is surely making an end of the system.

The question is frequently asked, why may we not let a portion of the public debt sufficient to comply with this provision run on indefinitely, in order to keep the best banking

dates of the passage of the Acts of June 20, 1874, January 14, 1875, and May 31, 1878, together with the amounts outstanding at date, and the increase or decrease.

NATIONAL BANK NOTES.

Amount outstanding June 20, 1874	$349,894,182
Amount outstanding January 14, 1875	351,861,450
Amount outstanding May 31, 1878	322,555,965
Amount outstanding at date	303,212,152
Decrease during the last month	1,157,593
Decrease since October 1, 1885	13,810,652

LEGAL TENDER NOTES.

Amount outstanding June 20, 1874	$382,000,000
Amount outstanding January 14, 1875	382,000,000
Amount retired under Act of January 14, 1875, to May 31, 1878	35,318,984
Amount outstanding on and since May 31, 1878	346,681,016
Amount on deposit with the Treasurer U. S. to redeem notes of insolvent and liquidating banks, and banks retiring circulation under Acts of June 20, 1874, and July 12, 1882	$68,529,417
Increase in deposit during the last month	6,327,918
Increase in deposit since October 1, 1885	28,655,274

The net amount of outstanding circulation is, of course, $303,212,152, less the amount of legal tenders deposited to redeem notes of insolvent banks, *etc.*, $68,529,417. In other words, the net bank-note circulation is now only $234,682,735.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

system the world ever saw alive? The reason is that the public will not allow any part of the debt to stand a moment beyond the time when it is possible to pay it. This determination is not based upon popular error. It is in accord with sound principles of finance. A national debt is never a national blessing, not even when supporting the best banking system the world ever saw. It would be an extremely fortunate thing if the whole of it could be paid off to-morrow. A national debt is akin to a mortgage on a farm. The annual interest enables the mortgagee to live without helping to cultivate the land. It may be, for a time, more advantageous to the farmer to pay the interest than to discharge the principal. But when he can no longer use the borrowed capital to an advantage equal to the interest, he will pay off the mortgage in obedience to a correct instinct. A government debt is in nowise different in its underlying principles. All the people of the United States make their living off the land in one way and another. The land is mortgaged and the interest on the mortgage enables a portion of their number to subsist without joining in the work of production. The larger the debt, the greater the number who can be and will be supported without plowing and hoeing, or using their mental powers for increasing the national wealth. In proportion as the debt is lessened the number of contributors to the common stock is augmented. A case may be imagined where it would be better for all that the public debt should not be paid, as for instance where the tax-payers were, as a rule, more intelligent and economical than the bondholders, and where each one applied the small savings resulting from reduced taxes to the work of reproduction more scrupulously and effectively than the bondholders would apply the larger sums coming to each of them through the payment of the debt. But such a case can never exist except in imagination. Everybody knows that the small gains accruing in unseen ways to the multitude are those most likely to be squandered, least likely to be converted into capital, while the larger sums represented by the national bonds, being already capital in the hands of the owners, are quite certain not to be squandered but to be used

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reproductively when returned to them. The payment of the public debt is, therefore, a true savings-bank operation to the community as a whole.

If it be asked whether there are not indirect advantages arising from the existence of a national debt, such as the perpetuation of the national banking system, and the facilities afforded for the investment of trust estates which have to be administered by the courts of law, the answer is that nothing is justifiable in the long run which necessitates more taxation than is needed to carry on the government. But all abstract argument is concluded by the fact that the people will not allow the debt to run on beyond the time when it is possible to pay it. Of this there can be no doubt; and it should be regarded as a most wholesome and reassuring fact that the greatest democracy the world has ever seen has been so eager to pay its debts that it would listen to no argument on the subject of its postponement upon any consideration whatever, even at the lowest imaginable rate of interest.

The termination of the existing security for national bank notes being conceded, it is worth while to ask whether anything else can be substituted for it. Evidently nothing else so good can be found. The government now guarantees absolutely the redemption of all the national bank notes, because it has securities in its hands composed entirely of its own obligations. It assumed no new obligation when it gave this guaranty. Its own liabilities were not increased. In an extreme case it might be called upon to redeem such notes faster than the bonds could be sold. To meet this extreme case a margin of ten per cent was required from the banks, but in no case has this margin ever been resorted to, although there have been many bank failures and two very considerable panics since the system was inaugurated. Would it be safe for the government to give its guaranty for the redemption of national bank notes, on any other conditions than those now prevailing? Of course, it must have securities to protect its own guaranty. What shall these be? Can it accept state bonds, city bonds, railroad bonds, or commercial paper? Can it accept an inferior security in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

exchange for a superior one; *i.e.*, for its own endorsement on the bank note? Certainly not. State bonds, city bonds, railroad bonds, and commercial paper are of every grade of goodness or badness. The shrewdest men of business get "stuck" with these things every day. The government would fare no better, but much worse, since every sort of unbusiness-like influence would be brought to bear upon the officers charged with discrimination between the various kinds of securities offered. It is not necessary to dwell upon this point.

The government's guaranty being out of the question, would any other guaranty be acceptable? I have elsewhere[1] said that a guaranty by all the banks for each other's notes, together with a change in the law, so as to give note-holders the first lien on the assets of a failed bank, the other working provisions of the law remaining as they are, would suffice. There is little likelihood, however, that this mutual guaranty could be obtained. The strong banks in the large cities do not particularly desire to issue circulating notes. Some inducement must be offered to them to join in such a plan. It must be made worth their while to go into it. They must have something in exchange for their endorsement, and it is difficult to see what could be given to them.

The suggestion has been made that the existing tax on national bank-note circulation (one per cent per annum) might be applied to the creation of a fund for the redemption of the notes of failed banks. The statistics of bank failures since the national system went into effect, show that a fund derived from this source might easily provide for all probable disasters. Of course, such a fund would require to be invested in something, this ultimate redemption fund being over and above the ordinary reserve required by law and by the principles of good banking. It would not be desirable to lock it up in gold coin. To carry the idea into effect, it would be incumbent on the government to deposit the fund in redemption banks at central points, to be used and accounted for, and to be drawn upon only in case of bank failures. There is some merit in this sugges-

[1] Lalor's Cyclopædia of Political Science, article "Money and its Substitutes."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion. It is, undoubtedly, capable of being carried into execution, since it involves no greater talent than that shown in the operation of the Safety Fund system of New York before the war. The essential point is that all the banks issuing circulating notes contribute a common insurance fund to provide against disasters. This contribution is no greater than they now pay to the government in the way of tax, and the tax itself is no longer needed by the government. The right to issue circulating notes is certainly a proper subject for a tax. It is to be said, on the other hand, that if the government does not need the tax, the banks themselves are the proper beneficiaries of the remission of it, each bank for itself, and that it is not in accord with justice to compel good banks to put up a fund for the benefit of bad ones. There are grave doubts as to the constitutionality of such a measure. Moreover, the existence of an insurance fund might serve as an incentive to swindling, just as fire insurance sometimes leads to the burning of property.

The more closely we look at the conditions of national bank circulation, the greater are the difficulties of keeping it alive. The national banks were summoned into existence as a means of helping the government to borrow money in a time of great need. All of their note-issuing functions were adapted to that end. The object was accomplished, and now the reverse process is going on. The government is paying back its borrowings, and the banks are going out of existence, as issuers of notes. They may continue indefinitely as machines for receiving deposits and discounting paper under federal authorization. There are very good reasons why the system should be kept going, even if the circulation comes to an end. It is part of our business training and of our acquired knowledge. It is uniform throughout the United States. Every banker and every lawyer knows what is the legal effect of any act done under it in any part of the country. The system of inspection by public officers, although not perfect, is growing better all the time. It is far better than any that we should get under state authority. When it becomes necessary to prosecute bank officers for misconduct, the administration of the law is more

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

speedy and thorough, and less liable to miscarriage, than the same kind of law would be under state administration.

But the note-issuing faculty of the national banks seems destined to come to an end, and the question must soon be answered: What shall take its place? Something will take its place. The need of a paper medium of circulation is, in every civilized country, imperative. There is little doubt that the prejudice against small notes in England, which has hitherto restricted the circulation to denominations of five pounds and upwards, will soon give way. There is not the least doubt that the people of this country will have either greenbacks, or silver and gold certificates, or state bank notes, in place of the disappearing notes of the national banks.

The first objection to greenbacks has already been touched upon. The issue of such notes is an act of borrowing. The borrower in this case has no use for the money. He will shortly have no use for a considerable share of the money he gets in the usual way, and the pressing need of the hour will be to get rid of the surplus. Why should anybody imagine that it is expedient or desirable to issue greenbacks in lieu of the retiring bank notes? Mr. Warner says, because the money market will get cramped and industry will be stifled by contraction of the currency. How does he know that? The process has been going on for a long time. The bank circulation was $351,000,000 in 1875. It is now only $234,000,000 net. Here is a difference of $117,000,000. Has anybody been hurt by it? Has any industry languished in consequence of it? It will be a sorry time for industry when the imaginings of congressmen, or of anybody, are substituted in place of the natural demands of commerce to determine how much paper currency is required. Mr. Warner thinks that we need just as many new greenbacks as we had of old bank notes. Other congressmen will think that we need more. Here lies the great danger. If we should give all power to decide this delicate question into Mr. Warner's hands for the time being, having confidence in his superior discernment, we have no assurance that he will be in Congress after the next election, or that he will be alive next year.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Nearly all the greenbackers place some limit upon the amount of "fiat" money that a country can usefully employ. Some of them estimate it by population, others by wealth, and others by acreage. Acreage is really a more philosophical gauge than population or wealth, because the community use less and less of either currency or coin, as they grow rich and populous, while they use more according as they are loosely scattered over wide tracts of country. The reason is that, in wealthy and densely populated districts, the rapidity of the circulation is great, and rapidity counts for more than quantity. Moreover, these districts use bank checks and clearing houses for the great bulk of their trading, and to an ever-increasing and really limitless extent. I have been expecting some genius to rise in our midst with an algebraic equation for population, wealth, acreage, and currency, so as to tell at any moment what amount of money is needed by any country, but I would advise Mr. Warner not to charge himself with such a task.

Our paper currency consists of greenbacks, national bank notes, and certificates of deposit (silver and gold certificates). The first is a fixed quantity and the others are variable.

As the people will not handle coin, either silver or gold, more than they are obliged to, one of these variable quantities will rise or fall inversely with the other. If the volume of bank notes is lessened, that of certificates will increase, and it is well for the silver men to understand this, if we are to have a debate in Congress on Mr. Warner's proposition. Greenbacks and silver certificates cannot both fill the vacuum left by the bank notes. If any means can be devised for "issuing" greenbacks, — that is, for borrowing money by forced loan in a time of peace and plenty, — then greenbacks may be put in the vacuum; but if not, and if no substitute is found for the present banking system, then certificates will fill the place left vacant. They are filling it now from day to day. The Treasury allows anybody who will deposit gold or gold value — and all money is now at gold value — to take certificates instead thereof. This process will go on until all the bank notes are supplanted with certificates, unless it is stopped by some kind of legislation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

As the gold certificates cannot be issued under the present law in less denominations than twenty dollars, their circulation is restricted; but they are now going out more rapidly than heretofore, because the government no longer discriminates in favor of silver certificates, as it has heretofore. Until Mr. Manning became Secretary of the Treasury, the department, receiving gold drafts on New York or Washington, delivered silver certificates in exchange therefor in any part of the country free of express charges, but did not perform this office for any other kind of circulating medium. The discrimination in favor of silver no longer exists. Consequently, gold certificates are, in part, filling the vacuum left by the disappearing bank notes; but they are handled exclusively by the banks in their dealings with each other, seldom appearing in general circulation. If the bankers are wise, they will "salt down" as many of these as possible, paying out anything else rather than a gold certificate, for the time may come when a gold dollar and a silver one will be readily distinguishable from each other in value.

The reason why they are not distinguishable now is that the government receives them on the same terms at the Custom House and the tax office. It is the common belief that when the volume of silver certificates becomes greater than the government can redeem in its revenue operations, the premium on gold will make its appearance, and that then we shall be on an exclusively silver basis. This is what the silver men are aiming at, and what the anti-silver men are apprehending. I think that both will be disappointed. I think that no greater amount of silver certificates *can* get out, in a normal condition of trade, than can be kept at par by this process. I think that the overplus of silver dollars will lie in the Treasury unused and unrepresented by certificates, except in a situation of commercial affairs where a suspension of specie payments would result even if there were no silver certificates or silver dollars, — such, for instance, as the panics of 1857 and 1873. (The latter was technically not a suspension of specie payments, but it was a suspension of bank payments, and would have been a suspension of specie payments if we had been on a specie basis.) I cannot

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

imagine a suspension of gold payments without an adverse balance of trade of such amount as to call for a very large exportation of gold. That we are liable to such an occurrence our experience shows, but we are not more liable to it than other commercial nations. Is there anything in the mere fact that the government is engaged in buying and stamping silver bullion to the extent of twenty-five millions a year, tending to drive trade into convulsions?

I cannot see how it should have that effect any more than any other profitless expenditure of a like sum; as, for instance, raising our army or navy expenses twenty-five millions above the necessary amount. Does the mere existence of a lot of coin in the vaults of the Treasury tend to produce "inflation"? I know that this opinion is held by very respectable authorities. What is inflation? It is a condition of trade which results from an exaggerated estimate of the value of things measured by money. Inflation, speculation, expansion of credits, over-confidence, are all pretty much the same thing. Does the existence of a lot of dollars, which nobody can get hold of without paying one hundred cents apiece for them, tend to produce the state of mind which results in inflation, speculation, expansion of credits, and over-confidence? Anybody who holds the affirmative is bound to show how the existence of such dollars in the Treasury operates differently from the existence of dollars or pounds sterling elsewhere, which can be obtained on the same condition of paying for them, and not otherwise. There is always a danger of fractious congressmen "getting up on their hind legs" at sight of their own pile of silver dollars, and proposing, as Senator Beck did, that they be distributed by cyclone. This procedure would, I think, cause inflation, because it would be a forced addition to the circulating medium, tending to raise prices and to incite speculation. Not being exportable at their face value, the new dollars would operate as the successive issues of greenbacks did during the war. So long as the government is carried on economically, and the outgo of the Treasury is met by its income, and nobody is allowed to get a silver dollar, or silver certificate, without paying its face value, there will be no "silver crisis"

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

any more than there would be an iron crisis if the government were buying and storing two million dollars' worth of pig metal every month.

It is certainly a curious coincidence that, in the absence of fresh legislation, the monetary system of this country, after the national bank notes shall have been withdrawn, will be identical in method with the Bank of England note system. That system provides for a fixed amount of "uncovered" notes, say £15,500,000, and, in addition thereto, as many more as the bank has gold for in its issue department. Our system, with the national bank notes out of the reckoning, will consist of a fixed sum in greenbacks, say $346,000,000, and, in addition thereto, as much more paper circulation in the form of certificates as the public choose to take out by depositing gold or silver dollars for. This coincidence between the Bank of England note system and the practice we are coming to, is not the result of design on our part. It is the result of a concurrence of adventitious circumstances. The war, which led to the greenback issues, was an accident in finance. So, also, was the national banking system; for it could never have come into existence without a great public debt. The gradual expiry of this system is no part of anybody's design. Indeed, the great majority of the people would be glad to keep it alive, if they could see any way to do so. The silver certificates were introduced to enable people to use silver without actually handling it, and the gold certificates were authorized to facilitate transactions between the banks. The net result, leaving out the national bank notes, is the Bank of England system. It is true that the Bank of England deals only in gold in issuing and redeeming its notes, while we employ both gold and silver. This is a difference of standard, but not of method. The difference is important, but the limits of this article do not permit me to go into the "battle of the standards."

The Bank of England system proceeds upon the assumption, or rather upon the ascertained fact, that a certain average amount of paper circulation will always be in the hands of the people, if they are satisfied beyond peradventure of its good-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ness. This assurance the government has given to the note-holders, by itself owing the bank a book-debt equal to the amount of the uncovered notes. If any more paper circulation is wanted than this average sum, it can be had by depositing gold for it. There is nothing harmful in this requirement. Any man who gets a five-pound note, whether of the covered or the uncovered issues, pays the value of one hundred shillings for it. It is no harder for him to get five gold sovereigns than it is to get the note. Therefore, if we are to have a convertible circulation at all, it is no hardship to require a gold deposit to precede the issuing of every note above the amount which experience shows will be always in the pockets of the people, or passing from hand to hand. But there are great advantages in requiring such a deposit, because the exigencies of foreign trade frequently call for payments in cash. Foreigners will not take our paper, and if we had no gold behind it, we should not be able to pay promptly.

We have seen what will happen if things are allowed to drift, if there is no new legislation in reference to banks. We shall have the currency methods of the Bank of England. The $346,000,000 of greenbacks will be the uncovered circulation, and the certificates against coin deposited will be the other half of that system. Is this a good system? It is certainly a good one for England. It would not be as good for us as the national banking system. My vote would be given for perpetuating the latter if I could see any way to do it. As between the Bank of England system and a new lot of greenbacks, or a revival of the old state bank systems, the former should be preferred. If the alternative should be offered of more greenbacks, or state bank issues, then the latter should be preferred for a variety of reasons. Not only is there no way to put out greenbacks honestly, when the government is not a borrower but is paying what it has previously borrowed, but there is no limit to the issues except the conceits of congressmen. Every range of opinion will find expression, then, from Mr. Warner, who would limit the new issues to the amount of bank notes retired, to the socialist spouter who thinks that the government ought to issue legal

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tender tickets to every man who does a day's work. When panic comes, when merchants, and bankers, and speculators are sore pressed and in danger of going to the wall, they become the most clamorous of all for government aid. So they have always been in England, when the day of reckoning has come, after a long course of bubble-blowing and kite-flying. So they were here in 1873. It will be wellnigh impossible for Congress to resist appeals for more greenbacks in such cases, reinforced, as they will be, by the fears and sufferings of laborers thrown out of employment. It is not necessary to say to any instructed person that the remedy would be worse than the disease. If we are pointed to the suspension of the Bank Act in England on certain rare occasions, we must bear in mind that the Bank is not the government. It is a great private business establishment, under the most weighty responsibilities to its shareholders and the most solemn obligation to pay its deposits promptly, capable of exercising a discretion between different borrowers, and bound to redeem its notes in gold on demand. Suspending the Bank Act does not relieve it of this duty, but merely authorizes it to issue additional notes, if it chooses to risk its own capital and solvency in that way. It rarely avails itself of the permission.

The dangers arising from fresh issues of greenbacks being so great, what are the objections to state banks? The principal one is heterogeneousness. There could be no one system applicable everywhere, and which all could understand. There were good state banks before the war, as well as bad ones, and good systems as well as bad ones. The state banks of Ohio, Indiana, and Missouri, for local purposes, had no superiors in any country. The bank systems of New York and New England were good. That of Louisiana was unsurpassed. Those of the South generally were good until Northern speculators went there to take advantage of their high credit, in order to manufacture currency for use in distant places. The systems of "free banking," which came in vogue in many Western states, were excessively bad. They bred an insurmountable distrust of everything, in the shape of paper currency, that has not the stamp and guar-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

anty of the national government upon it. Yet the evils there were such as would not be repeated. They were born of a deficiency of capital in proportion to the real needs of the community. People believed that if they could have banks in sufficient number, there would be plenty of money. Let the notes be secured by bonds of some kind in the state treasury, and nobody need concern himself whether the bank had any capital, or even an accessible place of business. Such a system would be impossible now. It is probable that the best of the old systems would be followed everywhere. Certainly those of proved badness would be rejected.

To revive state bank notes, it is only necessary for Congress to repeal the 10 per cent tax now imposed upon such issues. All the rest will come of itself. The South, or a large part of it, is eager to have this tax repealed, and repealed it will be if the East ever says the word. But this word should not be said unless the issue is made between "fiat" money and state banks. Even state bank notes, if not downright frauds, represent discounted commercial paper; *i.e.*, property in circulation between producer and consumer. Fiat money represents the will of Congress for the time being. Better leave commerce to find its own media of exchange under present arrangements, than adopt either of these alternatives.

HORACE WHITE.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE EXECUTIVE AND THE COURTS.

JUDICIAL REMEDIES AGAINST ADMINISTRATIVE ACTION.

ONE of the most important results of the scientific study of law in Europe during this century is the general adoption of a single, dominant principle of classification. All law is coming to be grouped, not by rights or wrongs, but according to the relations which it governs. The fundamental division — one which dates, it is true, from very early times,[1] but which has been thoroughly worked out only by modern jurisprudence — is that which separates public from private law. This division, though hinted at in the Justinian Code, was not made the basis of the arrangement of that celebrated body of law, and was, probably on that account, ignored by Blackstone and his followers in their classification. Of late years, however, it has been made the basis of all legal treatises on the continent, and is gradually creeping into the English and American law.[2]

Public law — one of the two great portions of the law set off by this division, and the only portion we are to consider — may be defined as that part of the law which governs the relations of the state or its organs with other states or with persons real or artificial within the state itself. Where its force is limited by the extent of the state itself, it is sometimes spoken of as *internal or national public law*.[3] This in its turn is divided into constitutional and administrative law. Constitutional law, as

[1] Holland, in his Jurisprudence, page 81, says the distinction "is beautifully worked out by Aristotle, who classifies offences according to those against whom they are committed. They are committed, he says, either against the state (τὸ κοινόν) or an individual (ἕνα τῶν κοινωνούντων). An assault is an injury to an individual, while avoiding military service is an injury to the state. (Rhet. 1, c. 13.)" Ulpian says: "hujus studii duae sunt positiones, publicum et privatum; publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem." (Inst. I. 1, § 4.)

[2] See Lorimer's Institutes, p. 537; Holland's Jurisprudence, pp. 77, 245; and Code of Iowa of 1874.

[3] In accordance with continental usage it may also be called simply public law: the public law *par excellence*; *droit public, Staatsrecht.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the term is here used, is not at all the equivalent of the American conception of constitutional law, which embraces simply the law in the constitution and the judicial constructions of it.[1] For, in order that a state have a constitutional law in the sense in which I am using the term, it is not necessary that it have a written constitution, or any laws differing in their process of making or of amendment from other laws;[2] nor again is every provision of a written constitution constitutional law. The majority of its provisions may be of this character, but it may also contain provisions of administrative law, or even of private law or parliamentary procedure,[3] as is often the case with the constitutions of our American commonwealths. Of course the American conception of constitutional law is valuable, and must always be borne in mind in those states which have a written constitution. For as the constitution can be amended only in a particular way, the law of the constitution, in case of conflict, overrides the ordinary statute law. But from the point of view of the relations which the law governs, this American conception is valueless.

What, then, is the conception of constitutional law as an integral portion of national public law, and how shall we distinguish it from the other part of public law, *viz.*, administrative law?

As definitions are proverbially dangerous, and as, in this case, all that have ever been given have proved inadequate to convey a clear idea of the distinction I wish to draw, I shall attempt to answer these questions by means of description and contrast.

Constitutional law defines in a very general way the limits of the exercise of sovereignty. That is, it gives the territorial extent of the state, and declares who owe it allegiance and may demand protection from it, and what are their rights and duties. It determines what is the supreme authority in the state, what are its representative organs, how they are formed, and what

[1] *I.e.*, we Americans classify our law according to the source from which it springs and the method by which it is made, rather than the relations which it governs.

[2] England, for example, has neither.

[3] See POLITICAL SCIENCE QUARTERLY, March, 1886, vol. i., p. 27.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

are their relations to each other, and what in the main are the ends which the particular state has in view.

Administrative law then fills the places left open by constitutional law. It regulates all minor points in the entire political organization of the state, and governs the exercise of those functions which the state is obliged to assume in order to attain the ends laid down by its constitutional law. While constitutional law gives the general plan of state action, administrative[1] law carries out this plan in its minutest details.

There are many ways of classifying the rules of administrative law; but in treating of those rules which govern the relations subsisting between the government and the individual citizen, — which is the object of this article, — I shall arrange them according to the kind of administrative action which their execution brings into play. For the nature of administrative action determines the kind of remedy offered to the individual for the protection of his rights. From this standpoint of classification, the rules of administrative law are of two kinds. They are either

(1) Absolute, unconditional commands; or

(2) Relative, conditional commands.

Commands of the first class simply direct all persons within the state, or certain classes therein, to do or not to do some given act, and punish the violation of their provisions with fine or imprisonment. Such rules of law are generally found in police laws, or in administrative ordinances issued by the administrative authorities within the state under a delegation of legislative power; and the penalties provided for their violation are usually prosecuted before special police courts, either by

[1] Perhaps an apology and explanation should be made for the use of a term for which there is so little authority in the United States. I am trying to obtain a general classification of national public law applicable to any nation. If this classification — which is generally adopted at present in Europe — is correct, then, unless our law differs fundamentally from the law of every other state, we must on examination find in our law the rules which we have placed under the head of administrative law. To these rules we can give no better name than that already adopted by French and German lawyers. For we have already adopted the word "administrative" in describing analogous relations. Thus, *e.g.*, we speak of reform in our governmental system as "administrative reform."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the ordinary prosecuting officers or by specially designated administrative officers. In many cases, in this country, the penalty is to be enforced by a simple civil action for debt prosecuted before a competent court by some officer of the administration. The tendency in all countries is to make them a part of the criminal law, and in such case the usual rules of criminal procedure are applied to them. In executing this class of administrative regulations, the action of government officers will of necessity be confined to calling the attention either of the prosecuting officers or of the competent courts to any violations. Then the court is to impose the penalty. For the enforcement of such rules there is thus no need of the exercise of any discretion on the part of administrative officers. They have simply to ascertain whether a rule of law has been violated. In case it has been, they do not even have the power to impose the penalty. Accordingly, if the system of criminal procedure is at all fair, as it is now in all fully civilized states, there is a guaranty that these unconditional commands will be enforced, so far as the individual is concerned, justly and impartially. On account of this fact, that no official discretion need be exercised in order to execute this class of rules, and that thus the individual is fully protected against the officers of the government, the whole system is more simple and more sure of application than any other that has yet been discovered. Therefore it is that the English and American administrative legislation has introduced this class of simple unconditional commands wherever it is in any way possible. We find them everywhere; in the customs administration, in the administration of the internal revenue,[1] in the sanitary laws, the highway laws, *etc.*

But there are certain duties which the government of every state is called upon to perform, which it cannot perform under a system of absolute unconditional commands. No legislature has such insight or so extended a vision as to be able to put

[1] Here the law does not try to assess a tax on the individual, but confines itself in the main to stating under what conditions he may carry on a taxable business, trusting that if these conditions are fulfilled, the amount of the tax determines itself. And that these conditions shall be fulfilled, it imposes fines and penalties on their non-fulfilment.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

into the form of simple commands, addressed to the public at large, rules declaring who may or may not pursue those trades which the public sees fit to license, or what taxes each tax-payer or piece of property shall pay. All it can do is to determine in a general way and declare by enactment what requirements those persons who wish to pursue licensed trades must fulfil, and under what conditions and to what amount taxes may be levied upon persons or property. So we find a second class of rules of administrative law; *viz.*, conditional commands. In many cases the difference in *form* between these and simple unconditional commands is very slight. For many rules of law which are actually dependent for their application on the presence of certain conditions are, in accordance with the desire for simplicity already noted, put into the form of simple unconditional commands. Such, for example, are the regulations regarding the removal of nuisances, and the many rules whose object is to protect the public health. In order to enforce them, the existence of the conditions on which they depend must be proven; so that though in form they may belong to the first class, in reality we have rules belonging to our second class — conditional commands. But in general the difference of form will be quite perceptible. There is no mistaking the difference in form between laws forbidding a person to do a given act, and laws which declare that certain persons only, — *viz.*, persons of good moral character, — may receive a license to sell liquors by the glass to be drank on the premises, or that certain classes of persons shall pay direct taxes at a certain rate of taxation. In the first case the way to execute the law is, as we have seen, to arrest and punish all persons who violate it; while in the other cases, before the law can be executed at all, it must be decided whether a given person who wants a license is of good moral character, and whether a given person or piece of property is exempt or liable to taxation, and what amount he or it, when liable, must pay. In other words, the existence of the conditions provided for by the law must be ascertained. Furthermore, it must be ascertained by an administrative officer of one kind or another, whose action supplementing the law is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

absolutely necessary for its execution. And such administrative officer must in the performance of this duty exercise a wide discretion.[1]

The determination reached by officers who have to exercise such a discretion is called in the English and American law an order, warrant, precept, or decision; and in the French law an "administrative act." It is to be enforced either by an administrative proceeding carried on by some competent administrative authority or authorities,[2] or by an appeal to the courts, which in some cases may, in other cases may not, question the validity of the act to be enforced.

In the performance of these duties the officers of the government are thrown into a daily contact with individuals. The government demands that the individual shall make sacrifices of his interests for the benefit of the public at large and of the state. It requires of him the payment of taxes, whose amount, in case they are direct, its officers must determine; it demands that he shall so use his property that it may not become an injury or an annoyance to the public; it requires that only certain persons shall follow certain occupations. And in all these cases the individual may claim that the officers of the government who are enforcing its demands have not acted in accordance with the law; or have not treated him fairly as compared with other individuals; or have decided contrary to the facts, where the decision is of a question of fact. Now for the decision of these conflicts between individuals and administrative officers, some means must be offered — some "administrative jurisdiction," if we may borrow from European jurisprudence a technical term as appropriate to our legal system as to the European. If no means are offered for the decision of such contests, the individual will be left at the mercy of government officers. It is true, of course, that

[1] Where an officer is to determine the value of a piece of property assessed for taxes, he must be given far greater discretion than the officer who is to enforce a highway ordinance (or law) declaring that no one shall drive faster than seven miles an hour. In the latter case we may say no discretion at all is exercised.

[2] An example of such a proceeding is a sale of property for the non-payment of taxes.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there are other means of holding officers to the impartial performance of their duties, such as criminal prosecutions and civil suits for damages; but on the completeness of the "administrative jurisdiction" depends in great measure the fulness of the protection offered to individual rights. For when a person is injured by an officer's non-performance or mal-performance of his duties, the criminal punishment of the officer, however satisfactory to the lower nature of the person injured, does not remedy the wrong; and suits for damages will be of little use if the officer is incapable of satisfying a judgment. So we must have an "administrative jurisdiction" of some sort.

Granted this necessity, in what manner shall it be met? What sort of "administrative jurisdiction" shall be adopted? Such jurisdiction assumes always one of two forms: either it is developed in the ordinary courts, or there are established for the trial of administrative questions separate courts, whose organization varies greatly in different countries.[1]

Let us take up first our own country, where the plan adopted is the same as in England. Here we find the highest development of the first of the two methods; *i.e.*, the formation in the ordinary courts of a special jurisdiction of administrative questions. There are, except in rare cases, no special courts for the trial of administrative cases. But there are special remedies offered in the ordinary courts, which have been developed in accordance with the needs of the individual who is at variance with the administration, and which therefore take different form according to the nature of his needs.

It will be seen on examination that his possible needs will be three in number. The dissatisfied individual will desire either,

(1) That a definite act be done, which by law should be done, but which the proper administrative officer or authority refuses to do; or

(2) That an administrative officer or authority refrain from

[1] By another and third system, the consideration of administrative questions may be forbidden to the courts, and the decision of such questions reserved to the administration. But in this case there is no *judicial* remedy at all; and we are at present considering judicial remedies only.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

doing an act which such officer or authority proposes to do; or from executing an order or regulation which such officer or authority has already issued; or

(3) That the decision of an administrative officer or authority, with which the individual in question is dissatisfied, be reviewed, in the hope that a decision more favorable to his interests may be obtained.

The remedies correspond to these wants:

Where one wants a given act to be done, he may have recourse to the extraordinary legal remedy found in the writ of *mandamus*.

Where one wishes to prevent the doing of an act by the administration, he may have recourse to the equitable remedy found in a bill of injunction.

Where one wishes to have a decision of the administration reviewed, in the hope of obtaining one more favorable, he may have recourse to the extraordinary legal remedy found in the writ of *certiorari*.[1]

Now the leading principle which runs through the law governing all of these remedies is that no recourse may be had to them in order to control the discretion of an administrative officer.[2] And in addition to this, special limitations have been put by the courts on the use of some of these remedies, which tend to decrease greatly their efficiency. Thus, to obtain an injunction, it is not sufficient that the act to be enjoined be illegal, but the party asking for an injunction must bring his

[1] There are still two other remedies: the writ of prohibition, which has fallen into almost complete disuse as an administrative remedy; and the writ of *habeas corpus*, for whose use there is now very little occasion, as detention of the person (except as a result of a conviction by a court) is not often a means of enforcing the rules of administrative law. But it is still made use of; *e.g.*, in the recent case against the Immigration Commissioners of New York, for detaining a Mormon immigrant on the ground that he was a pauper. — The writ of *quo warranto* is used only to try the title to office, and is therefore not a means for protecting individual rights in general, but only the particular right to an office.

[2] This principle is so well settled and so generally known, that it is almost superfluous to cite cases. These may be found in great numbers in any of the legal treatises on these subjects. See, however, for the *mandamus*, Kendall *vs.* United States, 12 Peters, 524; for the injunction, Gaines *vs.* Thompson, 7 Wall. 347; for the *certiorari*, People *vs.* Commissioners, 30 N. Y. 72.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

case under one of the special heads of equitable jurisdiction.[1] Again, it is difficult if not impossible to have recourse to the remedy by *mandamus*, in case the officer whose action it is desired to force, is one of the high executive state officers. This is so even where the duty in question is not discretionary, but ministerial in character.[2]

To the rule that official discretion will not be controlled by the courts, there are, however, several exceptions.

In the first place, the courts in their decisions have narrowed the conception of official discretion to such an extent, that they really do control it in many cases. Thus the New York courts have held that a statutory power of removal for cause does not confer discretion, and the exercise of it may be controlled by the courts.[3]

The second exception to the rule that courts will not attempt to control the discretion of public officers is established by certain statutes. In certain cases it has been expressly enacted that use may be made of one of the extraordinary legal remedies to review the decision of a pure question of fact, even when the officer who renders the decision has full discretion. This has been done most frequently in the financial administration; for at no time can the individual so easily come into conflict with the government as when it exercises its taxing power, and nowhere is there so much need of protection for individual rights as in the decision of the concrete question, how much taxes a given person must pay. The suffrage for all officers who decide what shall be the grand total of moneys to be raised by taxation may be made as wide as possible, and popular opinion as to the amount of taxation be thus voiced; and all the most minute details concerning the levying of the direct taxes may be fixed by legislation: but the power of deciding what precise amount of taxes a given individual shall pay must

[1] Green *vs.* Mumford, 5 R. I. 472, 475.

[2] For an interesting discussion of this point, see High on Mandamus, § 118 *et seq.*

[3] Matter of Nichols, 6 Abbott's New Cases, 494; People *vs.* Fire Commissioners, 72 N. Y. 445. It is greatly to be regretted that the courts have seen fit to narrow executive discretion in this particular instance; for the existence of executive responsibility depends upon a complete and untrammelled power of removal.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

be given to an administrative officer. For though the tax rate may be fixed by law, the basis on which it is levied — *i.e.*, the assessed valuation — is fixed by the assessors, and will in most cases not represent the opinion of the persons whose property is taxed. This has always been a weak point in our system, because the discretion which the general rules of our law grant to assessors runs great danger of being abused.[1] It is probably for this reason that in some states the attempt has been made to extend by statute the realm of the *certiorari* so that the decision of the question of fact — *i.e.*, the assessed valuation of taxable property — may be reviewed by the courts. A good example of this is found in the laws of New York,[2] by which an appeal by *certiorari* may be taken to the courts from the decision of tax-assessors who have assessed property illegally, unequally, or unfairly. By this statute the courts may control the discretion of the assessors and may substitute a new decision for that appealed from.[3] Another example of this second class of exceptions to our rule is found in a recent New York law,[4] which amends the laws regulating the sale of intoxicating liquors in all large cities in such a way as to permit any person who has been refused a license to apply to any court of record in the city, or a judge thereof, for a *mandamus* to compel the issue of the license. If the court finds that the license has been arbitrarily refused, or refused without good or valid reasons, it may by order direct the excise officers to grant the license.

Finally there are, in every state in our Union, statutory remedies which allow an appeal either to the higher administrative officers or to specially appointed commissions, which may review

[1] This is especially true in the cities, where the assessors often are appointed and salaried officers. In the country the usual method of filling this office is by election.

[2] L. 1880, ch. 269. This law is simply an extension to the whole state of L. 1859, ch. 302, § 20, — now § 821 of the New York Consolidated Act, L. 1882, ch. 410, — which first provided for appointed and salaried assessors for the city of New York.

[3] For other examples see Burroughs on Taxation, ch. xiii.

[4] L. 1886, ch. 496. This is the famous Sheridan Shook excise bill. It is a bad law, not because it permits the use of *mandamus* against the Excise Commissioners when they arbitrarily *refuse* a license, but because it does not also permit persons interested to appeal to the courts when a license is *granted* to an improper person.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the decision of questions of fact and discretion. These commissions are often provided for in the highway laws, and are allowed to review on appeal such decisions as the following: *e.g.*, decisions fixing the direction which a road shall pursue, or the damages to be paid for land taken for public use.[1]

Instances where an appeal has been granted to a higher administrative officer from the decision of a subordinate, may be found in the United States customs and internal revenue administration. Here, as is well known, the statutes[2] provide that an appeal can be taken from the decision of a collector, in the one case to the Secretary of the Treasury, and in the other to the Commissioner of Internal Revenue; and that only after an adverse decision on such appeal can recourse be had to the courts. This power of control over the collectors granted to the Secretary of the Treasury might have developed into a remedy of great efficiency to the individual, were not the idea so general in this country that the executive is to be regarded as an engine of tyranny and that recourse must be had to the courts for all protection of individual rights. In consequence of the attitude of the public, and the certainty, in all important cases, of an eventual appeal to the courts, the decisions of the Secretary have degenerated into formal confirmations of the collectors' decisions.[3]

We find in the administrative law of the separate states similar instances of this appeal from lower to higher officers. Take for example the appeal allowed by the New York law[4] to the Superintendent of Public Instruction from any act or decision of the school authorities pertaining to the common schools. The decision of the superintendent is final, and not subject to

[1] Sometimes, even, the review of such decisions is put in the hands of one of the courts. So in the New York Rapid Transit Act.

[2] U.S. Revised Statutes, secs. 2931, 3220.

[3] This, at least, is the popular belief; and, as far as the effects are concerned, the belief is the same thing as the fact. The individual appeals from the Secretary's decision because he does not think it impartial; and if he will not accept the decision as impartial, why should the Secretary trouble himself to make it so? We have here a "vicious circle" of cause and effect.

[4] Consolidated School Act of 1864, title xii.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

review in any place or court. The power thus given to appeal does not, however, preclude a person from having recourse to the courts.[1] The object of the legislature in granting this power was, in the language of the Supreme Court,[2] to afford "a cheap and expeditious mode of settling most, if not all, the difficulties arising in course of the execution of the law organizing and regulating the common schools." This seems to have been more successful than the appeal in customs cases, for reference to the reports of the Superintendents of Public Instruction shows that the number of appeals to that officer is constantly increasing.

But, with these few exceptions, the rule in this country is that recourse is to be had to the ordinary courts against the objectionable decision of an administrative officer; that the nature of the remedy varies in accordance with what is wanted; and that the action of the court must be confined to questions in whose decision the administrative authority has no discretion, the discretion of the administration being uncontrolled. Such is the answer, then, that has been given by American jurisprudence to the problem we are considering. Copying in great part the English system, it has formed in the ordinary courts a special "administrative jurisdiction."

The typical country, whose answer has been the formation of special administrative courts, is France. A consideration of these courts will be interesting and valuable, both because they have, with some modifications, been adopted in the larger part of Germany and are now an essential part of the administrative system of both countries, and because their purpose and functions are generally misunderstood by foreigners. As eminent an author as Mr. Dicey gives a false impression of them. His idea of them is given in the following passage:

> If we take France as the type of a continental state, we may assert with substantial accuracy that officials (under which word should be included all persons employed in the service of the state) are in their official capacity protected from the ordinary law of the land, exempted

[1] *Ex parte* Bennett, 3 Denio, 175. [2] *Ibid.*, p. 177.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies.[1]

The impression given by these passages is that these administrative courts have been created and are maintained for the purpose of trying suits brought against public officials, and that in them a system of law is administered, differing from that of the ordinary courts. Let us now examine the constitution and functions of these courts, and see if this impression is correct. To understand them a slight *résumé* of their history will be necessary.

Before 1789 the chief judicial bodies in France were the parliaments, which were composed of members of the privileged classes. The position of member of a parliament was venal, and therefore independent of the king. The powers of the parliaments were never clearly defined, and in the general confusion, prevalent at the time, as to the distribution of the three great powers of government, they often tried to assume powers which properly belonged to the king. When Louis XVI. came to the throne, in 1774, it was seen that great reforms in the administration of the government and in the social condition of the French people must be undertaken. For this purpose the king chose Turgot as one of his ministers. The reforms which Turgot endeavored to introduce did not meet with the approval of the privileged classes. Naturally the parliaments opposed these reforms, refused to register the various edicts[2] issued by the king, encroached upon the royal power by issuing decrees, and tried to hinder the action of royal officers by issuing injunctions against them, and citing them to appear before them.[3] When the liberal elements obtained control of the Constituent Assembly, this action of the parliaments was remembered, and the principle, already enunciated by Montesquieu,[4] that the three powers of government must be entrusted

[1] Dicey, The Law of the Constitution, p. 179. See also pp. 196, 197.

[2] So, for example, the edict abolishing the *corvée*, or enforced labor of the peasants.

[3] Aucoc, Conférences sur l'administration et le droit administratif, t. i., pp. 17, 52.

[4] Esprit des Lois, livre xi., ch. vi.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to different authorities, was incorporated into the celebrated "declaration of the rights of man and of the citizen."[1]

Montesquieu's principle was thus adopted, but not in such a way, as with us, as to give the judicial authority a control over the administration. On the contrary, the administrative authorities were not to be interfered with in the discharge of their functions by any act of the judiciary.[2] Judicial and administrative functions were to be separated, and forever remain distinct one from the other. Judges might not, under pain of forfeiting their positions, interfere in any way whatever with the acts of officers of the administration, nor cite such officers before them on account of their performance of their duties.[3] For, said the Constituent Assembly:

> The constitution will be equally violated, if the judiciary may meddle with administrative affairs and trouble administrative officers in the discharge of their duties. . . . Every act of the courts of justice which purports to oppose or arrest the action of the administration, being unconstitutional, shall be void and of no effect.[4]

This, then, is the origin of the great principle of the separation of powers which underlies all French law, and whose main object, it will be noticed, is not so much to protect tyrannical and oppressive officials as to ensure the continuous activity of the administration and the validity of its acts.[5] The prohibition placed on the courts, and the means provided for deciding what acts are administrative acts and are thus out of the competence of the courts of justice, are called the *garantie réelle* of the principle of the separation of powers. This *garantie réelle*, as its name indicates, protects, not the official personally, but

[1] Art. xvi.: "Qu'une société, dans laquelle la garantie des droits n'était pas assurée ni la séparation des pouvoirs déterminée, n'avait pas de constitution."

[2] L. 22 déc. 1789–8 janvier, 1790, § iii., art. 7, sur la constitution des assemblées administratives de département et de district.

[3] L. 16–24 août, 1790, titre ii., art 15, sur l'organisation judiciaire.

[4] Instructions annexed to the law last cited.

[5] The importance of this principle of the separation of powers and the benefits to be derived from it will be appreciated if we recall the many cases which have occurred recently, in which the courts of the city of New York have, by means of injunctions, restrained police officers from preventing palpable violations of the law. A good collection of these was made in an editorial in the New York Times of April 23, 1886.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

his acts — prevents their being reversed or even considered by the judiciary[1] — and the principle of the separation of powers thus guaranteed means that when an administrative officer has done an act connected with his duties (*e.g.*, granted or refused a license or made a valuation), the ordinary courts of justice may not directly, nor indirectly by entertaining suits for damages, review it, interfere with it, or hinder its execution.

The adoption of this principle, as we have seen, was due in great part to the unpopularity of the courts at the time when France was reorganized in the last century. Repeated attempts have been made to break it down and enlarge the competence of the ordinary courts, but the principle is to-day as strong as ever. What is it now which has led France to cling to this principle, which to many might appear to curtail individual rights?

The explanation is that, owing to the exclusion of the ordinary courts from the consideration of administrative questions, there has been developed a series of remedies which are cheaper and more effective than any that could be found in the ordinary courts. When the principle of the separation of powers was adopted, it was seen that some remedy must be offered to the individual against the acts of government officers. Access to the courts had been denied him, and if no means of appeal were given, he would be completely at the mercy of subordinate officers. There was formed, therefore, a most extended system of appeals from lower to higher administrative officers. It was very easy to do this in France, on account of the great centralization of the administrative system. From the ministers down, through their assistants and deputies, and the prefects and subprefects, to the mayors, almost all officers of the land, central and local, were appointed and removed at the pleasure of the central government or its agents. The power of direction was complete; the administrative control, very strong. The higher

[1] Formerly there was, in addition to this *garantie réelle*, also a *garantie personnelle*, which did really protect officials from suits in the ordinary courts. It seems, however, that since the decree of September 19, 1870, it no longer exists, and that officials may be mulcted in damages for overstepping the bounds of their competence. The question is, however, a very difficult one to settle.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

officers might thus, in almost all cases, review on appeal the decisions of their subordinates. Accordingly, the first laws which regulated the system of remedies established such appeals to the higher officers of the active administration.[1]

But care was soon taken to give the decision of the most important of these questions to authorities not immediately connected with the active administration,[2] to bodies more or less judicial in character. The active administration ceased to be at the same time party and judge. The plan was so successful that the jurisdiction of the most important administrative courts, the council of state and the councils of the prefecture, has been more and more extended; so much, indeed, that the latter, though legally special tribunals, are practically courts of general jurisdiction. They are special courts in that each branch of their jurisdiction must be based on some special statute, while all unenumerated matters belong to the residuary general jurisdiction of administrative officers. But the special statutes conferring jurisdiction have become so numerous, and embrace such a variety of subjects, that the administrative courts have now a far more important part to play than administrative officers in the decision of these *quasi* judicial matters. Further, as appeal may be taken to the council of state from the decisions of administrative officers acting judicially, as well as from those

[1] Thus the law of September 7–11, 1790, gave to the departmental and district assemblies — bodies resembling our boards of supervisors and county commissioners — the power to decide questions both of law and fact relative to the direct taxes. Other laws allowed the departmental assemblies, either of their own motion or on the complaint of an individual, to quash the illegal acts of the district, municipal, and communal officers; and, finally, the king, with the advice of his council of ministers, could in the same way quash the illegal acts of the departmental and district assemblies. L. 14 déc. 1789, art. 55–60; L. 22 déc. 1789–8 janvier, 1790, art. 28; L. 15–27 mars, 1791, art. 27, 32; L. 27 avril–25 mai, 1791, art. 14, 17; L. 7–14 oct. 1790. The constitution of the year III tended simply to enlarge the competence of the ministers in deciding alone and not in council.

[2] Two laws of the year VIII created the councils of the prefecture (L. 28 pluviôse, an VIII), and made the council of state an appellate tribunal to review the decisions of the ministers and these councils of the prefecture (const. 22 frimaire, an VIII). Special courts were formed for special branches of the administration; *e.g.*, the councils of revision for matters concerning enlistment of the army; assessment commissions for determining what assessments property especially benefited by local improvements should pay; and others.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of administrative courts, the decision of administrative cases in last resort is always vested in an authority completely separated from the active administration.

These administrative courts are of two general kinds: permanent and temporary. Temporary courts are called together for the decision of special questions. They resemble our commissions established for laying out roads or for deciding upon the assessment of property for local improvements. They are not characteristic of the French system of administrative jurisdiction, and need not be considered. Our attention will be directed solely to the permanent courts, the most important of which are the councils of the prefecture and the council of state. These are, as their names indicate, *councils* as well as courts; and it is often necessary that the president, ministers, or prefects ask for their opinion before taking important administrative measures.

The organization of the council of state is governed by the laws of May 24, 1872, and July 13, 1879, and is very complicated. Its main features are as follows: (1) The personnel, when it acts as an administrative court (*section du contentieux*), is completely separated from the active administration. This is not the rule when it acts as an advisory council. Its members are appointed by the president, and may be removed by him almost as easily as any administrative officer. (2) The qualifications for office are such as to bring in only men who have had long experience as administrative officers.

There is attached to the council, as well as to every administrative court, a representative of the government. His position is quite different from that of an American district attorney; *e.g.*, he has not the initiative in the prosecution of police penalties (in those few instances where the administrative courts have jurisdiction of this class of cases). He is to draw conclusions and give his opinion on every question of fact and law, in all cases, since the public has always an interest in these administrative questions. In so acting he is not, however, the simple advocate of the administration, but is rather an *amicus curiæ*, who is always present to enlighten the court, and who is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to defend or oppose the claims of the administration in accordance with the facts of the given case.[1]

The other court of special importance is the council of the prefecture. There is one in each department. Its organization is quite simple. It is composed of the prefect, as president, and of a certain number of councillors — varying in the different departments. They are appointed, and may be removed, by the president of the republic; and must be twenty-five years of age, licentiates of law, or have been for ten years in the public service; no councillor can have any other public employment or any other occupation.[2] Thus they are all professional officers, with a tenure dependent entirely on the executive.

Although by law the prefect is the president, and decides in case of a tie vote, in practice he seldom acts;[3] so that in the council of the prefecture there is practically the same separation of the personnel of the active administration from that of these administrative courts that we found in the council of state. We find the same attempt to fill the position of councillor with men experienced in administrative affairs; and we find also a representative of the government whose duties are the same as those of the corresponding officer in the council of state.

The only great difference between the organization of these administrative courts and that of the ordinary courts is that the tenure of the judges is not protected against the executive. This fact has often caused foreigners to reproach the French for preserving their system, and has led in France itself to violent attacks upon it. The last one was made in 1871,[4] when the proposition was made to abolish the councils of the prefection. This led to a very interesting discussion of the matter in the *Société de législation comparée*.[5] In the course of this discussion, M. Aucoc, the author of the celebrated *Lectures on Administration*, claimed that this tenure of the administrative judges was of great advantage. It enabled them, he pointed out, to be at the same time members of the different advisory

[1] Aucoc, Conférences, t. 1, p. 415.
[2] L. 21 juin, 1865.
[3] Aucoc, t. 1, p. 489.
[4] *Journal Officiel*, mai 24, 27, 29, 30.
[5] *Bulletin de la Société*, 1872–73, pp. 211, 275.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

administrative councils, which are placed at the side of government officers; and, as members of such councils, they were consulted by the active administration, and thus acquired a special knowledge of the law which was of great value, not only to the government itself, but also to the citizen.[1] But this view has not been accepted in other continental countries. In Prussia, where administrative courts have recently been established, a tenure of office independent of the executive has been adopted for the judges.[2] The objection is, however, purely theoretical. The decisions of the French administrative courts have not been so restrictive of private rights as those of the ordinary courts of justice where the judicial tenure is independent of the government. The following case, which is only one of many, is fairly illustrative of this point. A royal ordinance of November 15, 1846, gave the prefects the right to regulate the movements of all carriages about railway stations. In order to obtain regular communications between the railway station of Fontainebleau and the city itself, the railway company entered into negotiations with an owner of carriages to meet all trains. This man demanded a monopoly. At the request of the company, the prefect issued a general ordinance which forbade all carriages but those of this contractor to enter the court of the station. The proprietor of a hotel in Fontainebleau, who had been in the habit of sending an omnibus to meet travellers at the station, claimed that the ordinance was illegal. As the criminal courts have jurisdiction of suits for penalties for the violation of legal ordinances, the matter came up before a police court, and on appeal finally reached the highest of the ordinary judicial courts, the court of cassation. This body decided that the ordinance was legal, and that the hotel proprietor must pay the fine incurred by its violation.[3] Now, according to the French system, there is a further remedy. Any one may appeal directly to the council of state and claim that any administrative act, such as an ordinance or an order, is

[1] *Ibid.*, pp. 298, 299.

[2] Loening, Lehrbuch des deutschen Verwaltungsrecht, S. 803.

[3] Arrêts de la Cour de Cassation, 6 décembre, 1862; 25 août, 1864. Affaire Lesbats.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

invalid on the ground that the officer issuing it has exceeded his powers. The hotel proprietor made use of this remedy, and the council of state declared the ordinance to be invalid, because the police power given to the prefect might not be employed to create a monopoly.[1] Cases like this show that the tenure of the administrative judges has not been productive of evil results in France.

What now is the exact jurisdiction of these courts? This will, as in all countries, depend upon the nature of the administrative law, whose rules naturally fall into the two classes of unconditional and conditional commands. For the first, as we have seen, there is no need of an "administrative jurisdiction," since they can be enforced in the same way as the criminal law. The work of the administration is confined to calling the attention of the criminal courts to the fact of their violation. But notwithstanding this fact, an exception to the usual rule has made the council of the prefecture a police court, in which penalties for the violation of certain police regulations are presented.[2]

The usual rule in France, as with us, is that the decision as to the violation of the absolute commands contained in the administrative law, and the imposition of the penalties, is a part of the jurisdiction of the ordinary police courts.[3]

We come, then, to our second class of administrative rules, — the conditional commands, — for whose impartial execution the existence of an "administrative jurisdiction" is, as we have

[1] Arrêts du Conseil d'État, 25 février, 1864; 7 juin, 1865. M. Aucoc refers, in the discussion above mentioned, to other cases in which the council of state has been much more careful in protecting private rights than the court of cassation. *Bulletin de la Société de législation comparée*, 1872–73, p. 299.

[2] De Praneuf, Jurisdictions administratives et particulièrement des Conseils de Préfecture, chapitre xv.

[3] In fact, from this rule arises the one great exception to the principle of the separation of powers. For the article of the penal code on which this competence of the ordinary police courts is based (Art. 471, No. 15, Code Pénal) gives them the power to impose penalties for the violation of all ordinances *legally made*. This has been construed by the courts as giving them the power to decide what are legal ordinances; and when they think an ordinance is not legal, they simply refuse to impose a penalty. The ordinary courts do thus, in this one case, practically revise the acts of the administration. (Ducrocq, Cours de Droit Administratif, 6me édition, t. i., § 652.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

seen, necessary. It is the consideration of the questions arising in the execution of these commands which is the main function of the French administrative courts. They have, it is true, other functions to discharge, but these are not logically required by the nature of their jurisdiction. In some cases, also, questions which logically would be decided by them have been placed by special laws in the competence of the ordinary courts. Finally, decisions of a purely political character are not susceptible of appeal either to the administrative or to ordinary judicial courts.[1] But outside of these exceptions the rule is, as stated, that it is the duty of the administrative courts to decide questions arising from the attempt on the part of the administration to execute the conditional commands contained in the administrative law. On account of the fact that courts of special jurisdiction decide these questions, and in the main decide nothing else, it has been unnecessary to differentiate the remedies so much as with us. In general, whatever sort of relief is demanded by the individual having recourse to the courts, the form of the remedy is the same. It is a simple appeal from the act complained of, and a request that justice be done. It thus covers the ground occupied by all our special remedies, both legal and equitable. But it is not from every act of an administrative authority that such appeal can be taken, but only from an act applying to a special case, like an order or precept; and the act must have, as its immediate effect, the violation of an actual right founded on some law, ordinance, or contract.[2] The French law makes a clear distinction between such a *right* and the simple *interest* that one may have in obtaining a decision different from the one made. This distinction may best be made clear by an example which is given by M. Ducrocq. A French law forbids any citizen to change his name without the authorization of the president. No person is considered to have a *right* to change his name, and in refusing to authorize such a change the president violates no right. Therefore no one can appeal to the administrative courts from a decree

[1] Ducrocq, t. i., p. 233; Aucoc, t. i., p. 442.

[2] Aucoc, Conférences sur l'administration, t. i., p. 427.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which refuses to authorize such a change. But in case such a decree does authorize a change, the right of a third person may be injured, since a family name is considered to be of the nature of property. Therefore an appeal is allowed to an interested third person in such a case.[1] This distinction corresponds somewhat to that drawn in the American law, between discretionary and ministerial acts. But the American distinction is much less liberal than the French; for with us the possibility of invoking the "administrative jurisdiction" of the courts depends simply on the question whether by law the act appealed from is ministerial in character, and not at all on the question whether a right is involved. The French law rarely, if ever, extends the executive discretion so far as to deny the individual the right to have an administrative decision reviewed where an actual right is invaded. Our law sometimes does this. In New York, until quite recently, the discretion of assessors in valuing property for the assessment of direct taxes was unlimited. In France these direct-tax cases constitute the largest part of the appeals to the councils of the prefecture.[2]

This, then, is the general rule; that appeal may be had to the administrative courts from all administrative acts whose immediate effect is to violate a *right* founded on a law, ordinance or contract, but not from acts injuring simple *interests*. To the limitation contained in this rule there are certain exceptions. Certain acts which do not violate rights, but simply injure interests, may be made the subject of an appeal. For example, the authorization of the prefect or sub-prefect is required for the establishment, in certain places, of certain kinds of factories by which the public health might be endangered. Now, no one has an absolute vested right to establish such a factory, nor has any one a vested right that such a factory shall not be established. Nevertheless, in this case, parties interested may appeal from the decision of the prefect or sub-prefect granting or refusing such an authorization.[3]

[1] Ducrocq, t. i., § 249.

[2] Of 331,000 cases decided in 1875, 324,000 were direct-tax cases. Bulletin officiel du Ministère de l'Intérieur, 1876, p. 591; cited in Aucoc, t. i., p. 535.

[3] Bœuf, Droit Administratif, 1886, p. 448.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In addition to this general appeal to the competent administrative courts, — an appeal to which has been given the name *contentieux administratif*, — there is a further remedy which may be of great value in the protection of individual rights. This is the direct appeal to the council of state, in case of excess of powers. It was originally based on a law of 1790.[1] On the basis of this law, the council of state established in its decisions a most wide-reaching method of appeal, which received its final legal sanction by the law of May 24, 1872.[2] The appeal may be taken from any act of any administrative authority, whether the act be an order or a general regulation. The definition given to the phrase "excess of powers" is equally broad. It is not necessary, as is usually the case in the administrative courts, that the decision appealed from violate an actual right. The person appealing may have an interest simply; *i.e.*, the matter may be one in which the administration has discretionary powers in the French sense.[3] The appeal does not, however, suspend the execution of the decision, order, or regulation appealed from;[4] and the decision of the council simply affirms or quashes such decision, order, or regulation — *i.e.*, the council may not amend the wrong decision or substitute another for it.[5]

There are three grounds, according to the decisions of the council, upon which this appeal may be based. (1) The agent making the decision appealed from may have encroached upon the powers of another authority, which may be either the legislative, judicial, or another executive authority. Thus a prefect who issues an ordinance forbidding riparian owners of non-navigable streams to place obstructions on the bank, where there was to be a highway, encroaches upon the legislative power, to which is reserved the right of imposing an easement.[6]

[1] L. 7–9 oct., 1790. Art. 3 reads: "Les réclamations d'incompétence à l'égard des corps administratifs ne sont, en aucun cas, du ressort des tribunaux, et doivent être portées au roi, chef de l'administration générale."

[2] Law reorganizing the council.

[3] Aucoc, t. i., p. 459.

[4] Arrêts du Conseil, 5 mai, 1877, affaire Lammonier-Carriol.

[5] Aucoc, t. i., p. 459.

[6] Arrêts du Conseil, 15 déc., 1833, Gilbert et autres.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

(2) The administrative agent may not have followed the formalities which the law requires for the performance of a given act. Thus the law regulating the exercise of the right of eminent domain requires that the work shall be declared of public utility, and that this declaration, which is often made by a decree, shall be preceded by an investigation. The omission of this investigation constitutes an excess of powers.[1] (3) The excess of powers may consist in the fact that an administrative officer has not used his power for the purpose for which it is given him. The case, already cited,[2] in which a monopoly of access to a railway station was granted by an ordinance, the prefect issuing the ordinance having simply the police power over the station, is a good example.

This remedy is of great advantage to the individual citizen. Take, for example, the case where an authority issues a general ordinance with penalties attached to its violation. An individual whom it particularly affects may not wish to test its validity by first breaking it and then, when he is prosecuted before a police court, claiming that it is invalid. Rather than do this he will often prefer to obey it, although he may thereby suffer sensible loss. But by the method of appeal here described he may test its validity directly. The procedure is simple and inexpensive, and a decision may be reached very quickly.

Our remedy of *certiorari* operates in somewhat the same way, except that it can be employed only against special acts, like orders or precepts. Our law affords no method of directly attacking an ordinance or regulation.[3]

Such is the jurisdiction of the French administrative courts. They have been formed, not for the trial of suits against adminis-

[1] Arrêts du Conseil, 9 juin, 1849, de Carbon et consorts.

[2] See above, pp. 551, 552.

[3] The cases hold that the only means by which courts can interfere to annul directly an administrative act, *viz.*, the writ of *certiorari*, may not be made use of in the case of acts of a legislative character. People *vs.* Board of Health, 33 Barb. 344. This is true even though a local legislative body exceed its powers. S. C., 20 How. Pr. 458. See also case of Spring Valley Water Works *vs.* Bryant, 52 Cal. 132. The decision of this case was based on a special provision of the code of civil procedure, but the section in question was a simple statement of the common law.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

trative officers, as Mr. Dicey implies; nor for the trial of civil suits, in either contract or tort, against the government;[1] but for the purpose of affording the private citizen a speedy and inexpensive remedy against the acts of the administration, be they general in their character, like decrees or ordinances, or special, like warrants or orders. And their jurisdiction is larger than what we have called the "administrative jurisdiction" of our courts; for in addition to all the remedies which we offer, the French law allows the individual

(1) In all cases where an actual right is invaded, to have the discretion of administrative officers reviewed by the administrative courts; and

(2) To appeal directly to the highest of these courts against any acts of any officers, on the ground that they have acted without jurisdiction or in excess of their powers.

And not only is the actual jurisdiction of these French administrative courts larger than that of our ordinary courts, but the remedy is easier of application, because there is very little attempt at a differentiation of remedies in the procedure. There is never any question whether a given form, like a *mandamus*, or *certiorari*, or injunction, is the proper one. A simple appeal is to be made in all cases. The only difficulty which can arise is as to the jurisdiction of the courts themselves. The principle of the separation of powers may, and often does, give rise to conflicts of jurisdiction, which are decided by a special tribunal — the tribunal of conflicts. But when once the jurisdiction of an administrative court is admitted, there is no difficulty met with in the pleading. No one can be thrown out of court for having chosen a wrong remedy. Again, the procedure in the French administrative courts is very simple and inexpensive. This has been the aim of all the laws and decrees by which it is governed. Its further characteristics are as follows: It is in writing, though parties must, on their demand, be heard

[1] Cases of this sort go regularly before the ordinary courts, where the state occupies about the same position as an individual suitor. There are, it is true, certain matters in which, by an exception to the usual rule, suits against the state are tried before the administrative courts, and other rules applied than those of the civil code.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

orally.[1] It is the judge who directs it; he has the right to seek the truth himself wherever he may find it, and thus may order the production of all papers which appear to be necessary.[2] In other words, the procedure is inquisitorial in character.

The advantage of such a simple and inexpensive procedure can hardly be overestimated. It was the desire to secure this advantage which led the New York legislature to grant to the Superintendent of Public Instruction the "administrative jurisdiction" already noticed.[3] The desire to obtain such a procedure is one of the motives which have led to the introduction into Congress of numerous bills to create a court of customs and provide for the speedy trial of customs revenue cases.[4]

It has been shown that an "administrative jurisdiction," in the European sense, is not absolutely foreign to our law; but, on the contrary, has in some cases been adopted. The reasons that have led to this partial adoption are the same that have induced the French to retain the system in the far more extended form they have given it. And it is certainly a question worth considering, whether it would not be advisable for us either to adopt some such plan, or so to extend the jurisdiction of our ordinary courts, that the legislative and discretionary acts of administrative officers may be subject to a fuller judicial control. The tendency, as seen in the *certiorari* cases in the New York courts,[5] and in the New York laws of 1880 and 1886, in regard to the review by the courts of official discretion in assessment-valuation and license cases, seems to be in the latter direction. The advantages of this arrangement (*viz.*, the develop-

[1] D. 12 juillet, 1865, art. 11.

[2] Aucoc, Conférences, t. i., p. 521.

[3] See above, pp. 543, 544.

[4] The latest bill of this sort was introduced last spring (1886) by Mr. Abram S. Hewitt. It provides for a special court, one of whose judges shall be a customs expert. It is to be regretted that the bill does not give to the court the decision of all customs questions. It is desirable to give the importer the right of appealing from reappraisements, for our system of reappraisement is one of the weakest points in our customs law. See an article by the writer on "The Collection of Duties in the United States," POLITICAL SCIENCE QUARTERLY, March, 1886, p. 36.

[5] All these cases are collected and examined in People *vs.* Assessors, 39 N. Y. 81.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ment of an "administrative jurisdiction" in the ordinary courts) are, that we may thus make use of existing institutions, and may avoid the conflicts which always result from the presence of two series of courts whose jurisdictions it is often difficult to distinguish. But this solution of the question has also its disadvantages. The cumbrous forms of the ordinary courts are introduced into matters which, on account of the great public interests connected with them, need a speedy and inexpensive system of procedure. Again, administrative cases require for a correct and fair decision of the numerous questions of fact and expediency contained in them, the possession on the part of the judges of a certain amount of expert knowledge. This expert knowledge will rarely be found in the judges of the ordinary courts, who are simply learned in the law, and generally in but one of its branches — private law.

FRANK J. GOODNOW.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

SCIENTIFIC SOCIALISM.

RODBERTUS.

THE current ideas in this country respecting theoretical socialism are derived chiefly from the last work of Marx, *Das Kapital.* The views which prevail concerning the policy of the socialists are such as the International, the Socialistic Labor Party, and the Anarchists have given rise to. These are thought to be the only possible theories and policy. But many of the German economists have come to regard Rodbertus as the real master of scientific socialism, and to assign Marx to a secondary place as a theorist. There are also some important points wherein his views differ from those of Marx. The reputation which Rodbertus has acquired as a thinker, and the inherent excellence of his works, furnish the excuse for this attempt to outline his life and theory.[1]

Carl Rodbertus, like Marx and Lassalle, was educated amid the movements which led to the revolution of 1848, and received

[1] In order to avoid the multiplication of references, the titles of the most important works of (and about) Rodbertus which have been used in preparing this article are given here together.

Zur Erkentniss unserer staatswirthschaftlichen Zustände. 1842.

Sociale Briefe an von Kirchmann :

Erster Brief, Die sociale Bedeutung der Staatswirthschaft. 1850. Reprinted in 1885. This edition contains Rodbertus' history of crises.

Zweiter Brief und *dritter Brief* appeared first in 1850 and 1851, but were reprinted together in 1875 under the title: *Zur Beleuchtung der socialen Frage.* The Second Letter contains the author's theory of the distribution of the national product. The most important portion of it has been reprinted in the first volume of R. Meyer's *Emancipationskampf des vierten Standes.* The Third Letter contains Rodbertus' theory of rent and the argument against Ricardo's doctrine.

Vierter Brief, Das Kapital, was published in 1884 by Wagner and Kozak from the literary remains of Rodbertus. It contains more important material than any other in the series. Besides a *résumé* of his theory of rent and of crises, Rodbertus unfolds in this his doctrine of capital, and describes society as it is organized, with private property in land and capital, and as it will be when private ownership shall be abolished.

In 1885 that which the author had completed of the second part of the Fourth

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

his practical training during that revolution. Born in 1805, the son of a professor of law in the University of Greifswald, he himself studied law, history, political economy, and philology at various universities ; and, after a brief time spent in travel, bought the estate of Jagetzow, in Pomerania, where he settled down to the life of a landed proprietor. The agitations preceding 1848 called him from seclusion to a place in the Provincial Diet, and afterwards in the Second United Diet, which met at Berlin in 1847. While in this body he acted as member of a commission to prepare a new election law for the National Assembly. The king offered him a patent of nobility, but this honor Rodbertus declined. Early in the next year he was elected to the new Constitutional Assembly. Later he was for a short time member of the cabinet, but resigned because he saw that the government would not come to terms with the parliament at Frankfort. During 1849 Rodbertus labored at Berlin to secure the acceptance of the constitution of Frankfort; but it was in vain. After that was rejected, and the political reaction set in, he retired from public life, never to enter it again. When the restoration of the German unity was in progress, he sympathized fully with the policy of Bismarck and the Prussian monarchy,

Social Letter was published. It contains some very important material on the method of transition to the socialistic state.

Zur Erklärung und Abhülfe der heutigen Kreditnoth des Grundbesitzes. Two volumes, 1868 and 1869. This contains the explanation of the crisis in German landed property, and of the *Rentenprincip*.

Rodbertus' articles on the economic history of Rome, *Untersuchen auf dem Gebiete der Nationalökonomie des klassischen Alterthums*, are to be found in *Hildebrand's Jahrbücher*. They appeared, 1864–74, in volumes ii. to xxiii.

Briefe und socialpolitische Aufsätze, issued in two volumes, by R. Meyer, Berlin, 1882, contain Rodbertus' correspondence with Meyer from 1871 to his death in 1875, and many short articles which were contributed to the Berlin *Revue*.

Prof. Adolph Wagner contributed to the *Tübinger Zeitschrift*, in 1878, under the title, *Einiges von und über Rodbertus*, some additional correspondence and a reprint of the *Normal-Arbeitstag*.

Briefe von Ferdinand Lassalle an Carl Rodbertus-Jagetzow, Berlin, 1878, throw light on the relations existing between the two socialistic leaders.

Dr. Theophil Kozak, in a book entitled: *Rodbertus-Jagetzow's socialökonomische Ansichten*, Jena, 1882, has given a systematic statement of his entire theory, mainly in the language of Rodbertus himself. It is thoroughly trustworthy, and a most valuable help to the understanding of the author.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

but took no active part in the movement. Even the socialistic agitation of Lassalle did not bring him to the front. Yet after 1860 he was known to all the socialistic leaders, and was often called upon to address their meetings or send them letters of advice. He never acceded to the former request, though he sometimes did to the latter. He shunned the work of an agitator. He was too much of a conservative to act otherwise than in full agreement with the powers that be.[1] Thus Rodbertus lived almost unknown to the general public till his death in 1875. His fame is chiefly posthumous, and is due in a degree to the labors of his disciples and admirers. His life was one of thought rather than of action. About the theories which he elaborated centres the chief interest of his career.

Rodbertus formulated his views on politics and economics early in life and adhered to them with little change throughout. His best years were passed while the Hegelian school of thought was dominant in Germany. Though he did not expressly ally himself to any branch of it, as Marx did, yet he is full of the idea of historic evolution. His doctrine, as well as Hegel's, was an outgrowth of the prevalent tendency toward historic research which had its rise at Göttingen in the latter part of the eighteenth century. Rodbertus had nothing in common with the pessimistic and fatalistic views of the young Hegelians. He was always a firm believer in human progress, as the result of conscious activity, and was a firm theist.

Extreme *laissez faire* notions never found acceptance in Germany. The theoretical views of Adam Smith always met with abundant criticism there. This is to be explained by the fact that the German state is too prominent in industrial enterprises, as well as in all other spheres of action, to be ignored in economic theory. Moreover, historical study opened the way for criticism of the existing social order in the light of experience. The historical study of institutions, inclusive of the state

[1] During the troubles of 1848 his place was in the party of the centre or of "all the talents," where he urged the introduction of a popular representative element into the constitution, without making any violent break with the history and traditions of the nation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which is above and around them all, was favorable to the social view of political economy. It promoted the habit of looking at economic phenomena from the standpoint of the community and of social development in general. Hence, as soon as the modern industrial system, with its crises and other drawbacks, was developed in Germany, the way was prepared for intelligent criticism. Use was made of the works of Sismondi, and the earlier French socialists, but independent lines of thought were developed.

Rodbertus became impressed very early with the advantage which might come to the political sciences from following out the analogies which exist between the development of nature and of society. His philosophy professes to cover all of life, and aims at the most comprehensive view. To him life in society is the result of the inter-action of a trinity of forces — spirit, will, and matter; or the intellectual, manifesting itself in science and language; the moral, appearing in morality and law; and the material, or the sphere with which economics deal. The conditions in the lowest stages of social development are analogous to those of inorganic nature, or to the lowest forms of organic existence. With the advent of agriculture, based on the institution of slavery, society becomes organized, and states appear. When once that point is reached, all impulses to progress spring from society, and result in its movement as a whole. This idea Rodbertus keeps ever in mind. He constantly emphasizes the fact that the social standpoint is the one from which the phenomena of organic human life should be viewed. On that hinges his criticism of economic theories and public policy. But, as we shall see, he holds that the periods of transition from one form of organization to another are those in which the largest amount of individual liberty prevails.

All great historic changes are economic in their origin. Human labor is the one universal economic factor. Therefore the great periods of history will be distinguished from one another chiefly by the forms in which labor is organized. In pursuance of this thought Rodbertus — passing over primitive society, where the clan constitution prevailed, where all

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

property was communal and only simple economic conceptions apply — divides the history of mankind into two periods:

(1) The ancient Heathen State, which, after passing through the forms of theocracy and satrapy, culminated in the *polis*;

(2) The German-Christian State. This has traversed the feudal and bureaucratic stages, and is now existing under the representative form.

The radical distinction between the two is, that in the former the individual had no rights as against the state, and all labor was slave labor; in the latter, human rights were recognized and human slavery disappears.

Rodbertus' historic studies were devoted chiefly to Rome, and therefore its economic development occupies a larger share of his attention than that of any other period of history except our own. He views it as the culmination of the *polis*, and as illustrating all which that form of development has to offer. The *oikos*, or primitive family, formed the germ of the ancient city-state among the Greeks and Romans. Here the economic arrangements were simple, and such as would be found in a community where there was no division of labor, no distinction between manufacturing and agriculture, but little transportation, few exchanges, limited use of money, and where there could be no contest between the laborer and the capitalist, because the former was the property of the latter. There was but one form of tax, a progressive income tax in Athens, and a general property tax for citizens in Rome. The expenses of the state were few. There was but little distinction between it and society. The same families were leaders of both. Solidarity was the principle of organization throughout.

The growth of individualism in Rome began with the legislation of Servius Tullius, and ended with the full realization of the policy of the Empire. It was the work largely of the capitalist party of which Cæsar was the leader and representative. The strength of the family bond was weakened. Industry developed, new forms of production began to be carried on by corporations independent of the *oikos*. The system of taxation was enlarged by the early emperors to cover the newly devel-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

oped enterprises. A special capitation tax, for instance, was levied by Alexander Severus on slaves, because their labor as artisans had become so profitable to their masters. When Caracalla in 213 admitted all the provincials to citizenship, uniformity between the Italian and the provincial system of taxation was approximately established. Systematic plundering of the provinces ceased. Means were taken to facilitate transfers of land. For a long time previous to this, freedom of traffic had existed between all parts of the empire. Thus free competition (*Freihandel*) was established for the first time in history throughout the civilized world.

By the system of free competition, Rodbertus means not the absence of customs duties levied on the boundaries of a country, nor unhindered communication between different parts of the same country for industrial purposes, but absence of economic organization, *i.e.*, of legal combinations of persons engaged in similar pursuits. It is individualism, the negation of all forms in the domains of science, law, and labor. It means the disintegration of society. When one form of social organization has lived its time, a process of dissolution begins. Individuals struggle against the old in the domains of science (free thought), of law (political freedom), and of economy (freedom of competition). By these assaults the old forms are broken down. All that remains is a certain store of knowledge, the elements of faith, the principles of morality, — especially those which involve protection for person and property, — and a definite division of property. To every person is given the free use of his powers for production up to the limits of the criminal law. It is then thought that social laws operate like natural laws, and will of themselves work out the common weal. In its extreme form this involves the negation of the state. "Anarchy is panarchy" becomes the motto of the system. Persons who live in periods when the theory of free competition is carried into practice think they have reached an advanced stage of progress. They are really living in a time of transition, when the old is being torn away preparatory to a higher form of combination. If the tendency to individualism is allowed to operate

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

without restraint, it will prove unfavorable to freedom, because it will destroy the unity of the state. Ultimately, the state must interfere in the interest of public welfare, check the struggle for existence, and establish new social forms. Community feeling is the positive, constructive, life-giving principle in society. Individualism can stimulate for a time, but its effect must be temporary.

The period of freedom of competition in the Roman Empire continued fully developed from Cæsar to Diocletian. Its operation was on the one hand intensified by slavery, but on the other moderated by colonization. It produced great social inequality. Still, economic institutions continued to bear to a certain extent the stamp of antiquity. Barter always remained a prevalent form of exchange. The book-keeping of the Romans, both private and national, shows that even in the later Empire money was by no means universally employed. Also, the old theory of the unlimited power of the state was still held. Hence, the principles of solidarity in taxation, arbitrary assessments, payment in kind or by personal services rendered to the state, were employed with crushing effect by the later emperors. The needs of a vast military-despotism were supplied by a system of taxation which had originated in the city-state, where the expenditures were few and civil power unlimited. It was in part the combination of the old and the new in the conditions of the Empire which made the fiscal policy of Diocletian and his successors so oppressive.

Diocletian brought the period of Roman *laissez faire* to an end. For fiscal purposes he sought to introduce the hereditary principle into all corporations, to freeze society into the forms which it then held. Moreover, with Constantine began a series of laws by which the *coloni*, who, since the later Republic, had been somewhat loosely attached to the soil, were now firmly bound to it (*adscriptitii*). This process was completed by the time of Justinian, and from the class thus formed developed the mediæval peasantry (*Bauernstand*). In this way originated one of the chief differences between ancient and modern society — the economic distinction between city and country. Agricul-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ture and manufacturing, which in the primitive city had been carried on indiscriminately by all, henceforth became the pursuits of two distinct social classes.

Thus the way was prepared for the downfall of the Roman system by the contradictions which were developed within it. The Germans only completed a work which was far advanced before they appeared west of the Rhine or south of the Danube. The Roman nationality, as well as the ancient economic institutions, disappeared in the transition to the German-Christian State.[1]

From the abandonment of the slave system, and the rise of the distinction between city and country, follow all the economic characteristics of modern as distinguished from ancient society. The power of the state is now limited by the rights of the individual. A conflict between labor and capital becomes possible. It was impossible in antiquity, because the laborer was the property of the capitalist. Lastly, the separation of employments, beginning with the appearance of agriculture and manufactures as independent pursuits, and the organization of labor which has grown up with this separation, divides society into classes unknown to the ancients.

We are living in the third stage of the development of the German-Christian State, *viz.*, the representative. The bloom of the representative state coincides with the existence of the second period of free competition in the world's history. It was ushered in by the industrial growth of the last quarter of the eighteenth century. This movement was accompanied by sweeping legislation, based on the principle of "natural rights," which has established in the western nations freedom of labor and domestic traffic, and the equality of all before the law. The legislators who have carried this out stand to the present social system in a relation similar to that borne by Servius Tullius and Cæsar to the period of Roman *laissez faire*. The old restrictions were justly condemned and abandoned because they were proven to be injurious. The revolution proceeded from

[1] Robertus did not live to complete his account of the transition period after Diocletian. He announced another article on that, but died before it was written.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the real needs of the time, but it resulted in social disorganization. The development of the existing social order is no further advanced now than that of antiquity was in the time of Cæsar. It has by no means borne its full fruit. Neither is it the last and highest possible form of social development. It is transitional, like its predecessor. Through it the way is being prepared for a higher form of organization than that of antiquity or of the middle ages.

Rodbertus bases his discussion of the phenomena of our present social order on the doctrines of Smith and Ricardo. According to the views indicated above, he regards society as composed of laborers and capitalists, who are rivals in the struggle for existence. The one class possesses the instruments of production, and the other is unable to obtain a chance to labor without the consent of its opponents. The remuneration of the laborer is fixed by contract. In antiquity the master was bound to support his slave, if he was to have the results of his labor. Now the laborer has what he can get.

In his analysis of production and distribution under the system of division of labor, Rodbertus differs from the English economists only in viewing the subject from the social standpoint. He conceives of society as divided into several classes,—the raw-producers, the half-manufacturers, the manufacturers, the transporters. Commodities are ever passing in a continuous stream through the hands of these producers. If the current were stopped at any time, commodities would be found at all points along the line, from the raw-producers to the consumers. Also, the general classes of producers are subdivided into branches, as the various forms of raw-production and manufacturing, and these again are carried on as individual enterprises. The division of labor, by separating producers into classes, causes the development of the market, and makes exchange universal. With exchange, money comes into general use. As society advances, money will lose its character as a commodity, and be used only for settling balances. Then we shall have reached the period of credit economy.

But little is to be gained by looking only at the individualistic

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

side of division of labor. Its essence is community of labor, whether we contemplate the work in a factory, or enterprises which encircle the globe. A truly national and world-economy arises from it. It is the material bond which, with law and language, unites men in society. Each labors for all, and all for each. If we follow a commodity through all the stages of its course from the raw-producer to the consumer, we shall see that each class is dependent on all the others for the success of its work. Each class depends on the one before it for its raw material. By neglecting this point of view, the earlier economists have failed to see that the national product is a unit, in which all classes of producers share. By the same cause they have been led to adopt the erroneous view that the value of the product depends on the amount of the shares into which it is divided; *e.g.*, that the price of the product is affected by the rate of wages; that high wages hinder competition.

Distribution is more individualistic in its character than production. All who have contributed in any way to the work of production put in their claims and receive a part of the product. Public law decides how much shall go to society and the employees of the state. The amount which goes to individuals is fixed by competition in the form of rent, wages, and profits. The class engaged in transportation conveys the product to the individual to whom it belongs. But even in distribution the communistic element predominates, though obscured by the present legal system. Society is a unit; not simply an aggregate of individuals. The income of the state and of the various associations within it far exceeds that of any individual.

Here, then, we have a picture of the operation of supply and demand on the largest scale. In primitive society it was easy to adapt the one of these to the other. Each producer could easily obtain the full result of his labor, because production and consumption touched each other. But in the present complex society the adaptation of supply to demand becomes a service to the public of the most important and delicate character, requiring special knowledge and ability. The work is actually done by the capitalists, the managers of production, who, though

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

acting in a private capacity, are yet performing the service of public functionaries.

In the course of the preceding discussion we have had hints of the line of thought which Rodbertus would naturally pursue in his criticism of the existing social order. His historical philosophy is full of the idea that social systems are only relatively excellent; that is, excellent to the degree in which they satisfy the needs of the times. Every system hitherto has contained a latent contradiction. This has slowly developed till the conditions of life have become intolerable. Then has followed a revolution, either sudden and by force, or gradual and peaceful. Rome fell because of the contradiction between the old principle of the omnipotence of the state, and the new economic conditions of the Empire. A contradiction exists in our society, arising from the relations between labor and capital, which will inevitably, in the one way or the other, cause the overthrow of existing property institutions. The argument by which Rodbertus seeks to establish this proposition runs as follows:

He starts from the Ricardian doctrine that labor is the only productive agent. Therefore, he argues, it must be the only source of value. He gives a broad definition of labor, *viz.*, the expenditure of human energy. He therefore includes under the term intellectual as well as physical labor. He acknowledges that nature is the source from which forces and materials are derived; but its activity is not economic. Economy begins and ends with man in society; either in the family or in some larger association. It is only through human labor bestowed upon them that natural products become commodities. Before that, they form the subject-matter of the natural, but not of the social sciences. In order to attain clear definition and classification, it is necessary to exclude from economics all consideration of nature apart from human labor. Economic science takes nature's work for granted, but from that work it is impossible to derive any rights in distribution. Land is neither capital, nor a productive factor. It is only through a misdirected social development that it has come to be so considered. Physical

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

labor is "immediately" productive, and so should receive a share in "direct distribution." Intellectual labor is "mediately" productive, and is entitled to share in "derivative distribution." The classification of society into laborers and capitalists, meaning by the former those whose labor is mostly physical and comparatively unskilled, employed in the mass and paid according to the time spent, is perfectly justifiable.

This doctrine of labor is, of course, given its due weight in Rodbertus' theory of capital. But another point of prime importance here is his distinction between essential capital (*Kapital an sich*) and historic capital. This involves also his theory of income. When we look at economic phenomena from the standpoint of the community, we find that the products of labor fall into two classes, *essential capital* and *income*. The former consists of those products which are devoted to the purposes of immediate production; the latter is composed of those which are accumulated in order that they may be consumed. They are the means of satisfaction; *e.g.*, objects of luxury, furniture, and the like. Capital, on the other hand, comprises tools and materials actually used in productive enterprises. Capital is not the result of saving; it is not an accumulation (*Vorrath*). Its nature is that it should be consumed almost as fast as it is produced. It is produced that it may disappear as soon as possible in new products. J. S. Mill's statement about the rapid disappearance of capital is eminently true. Saving or accumulation would necessarily defeat the end of its existence. How can materials and tools be saved? Nobody thinks of accumulating such, or of producing them for the purpose of accumulation. Essential capital, therefore, cannot be the result of saving, neither can that theory of its origin furnish the source of any claim for the capitalist in distribution. Capital is solely the product of labor, mediate or immediate. The labor bestowed upon the manufacture of a machine is, so far as the products of that machine are concerned, mediate labor. The labor of operating the machine itself in the manufacture of final products is immediate labor. If the machine cost n labor, and produces x goods before it is worn out, and if we designate the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

immediate labor bestowed by m, then the value of each commodity produced will be represented by the formula $m + \frac{n}{x}$.

Essential capital, then, is not a productive agent. It is simply intensified labor. All implements are *vorgethane Arbeit*—labor already performed, accumulated labor. When a person uses an implement in a productive operation, he is calling into activity the labor of the present and of the past. The prehistoric man first increased the efficiency of his labor. He then had time left, after satisfying his wants, which he devoted to the making of his first tool. Production in all its stages is only a repetition of this process. When a new and better machine is put in the place of an old one, there is no increase of capital. On the other hand, there is often a positive diminution of the same, and that according to the prevailing notion of capital.

Moreover, the way in which products are distributed makes no difference with the fact that they have sprung entirely from labor. If we follow the series of productive operations back to their very beginning, we find that they resolve themselves into labor, and their products into the results of labor. Capital is ever rising to the surface of this vast stream of production only to sink again and disappear.

Finally, essential capital is not the source of income. Labor is the source of both. Capital may become income by being diverted from productive purposes to those of consumption. In the isolated and primitive condition of society, capital and income stand to each other in the relation of successive steps in economic progress, the one constantly passing into the other. But the connection of cause and effect does not exist between the two. Income may be great or small in proportion to capital, but not because it is created by capital. The income and capital of a nation together form the collective product of its labor, and this product is distributed among the different classes of producers.

Historic capital is a product of the system of private property in land and the other means of production. It is private capital, a result of social development, and therefore has no claim to universality or permanency. Private property in land arose

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in consequence of the appropriation by individuals of the primitive communal domain. All the implements and materials of production have been appropriated by a special class — the capitalists. They employ these in productive enterprises of which they have complete control. Capitalists decide what enterprises shall be undertaken and upon what scale they shall be carried on. They advance the means for prosecuting the business and are the owners of the entire product. Their object in this is private gain. They will undertake nothing unless there promises to be a good demand, and that implies a previous accumulation and distribution of property. The laborers, who are the real producers, form a distinct class over against the capitalists. They own none of the implements and materials which they have produced. They use those which the capitalist, their employer, furnishes; and during the actual periods of production they live upon the commodities which he advances. Hence it seems as if the capitalist contributed an important productive agent, and that the profit which he receives is a return for its use. But this is to mistake the *possession* of capital for capital itself. The radical error in the theories of the earlier economists is that on this point they have confounded the appearance with the reality. The capitalist class is enabled to perform its function, not because it controls a separate factor of production, but because it has appropriated the lion's share of the products of labor. This result has been produced by laws favoring capital, and by the unequal conditions under which, from the first, labor has competed.

It follows from the doctrine already advanced that wages do not form a part of capital, but, with rent and profits, belong to national income. Whether they are paid after or before the sale of the product, the commodities out of which the wages come were produced before the time of making the payment. The wages paid at the close of each period of production, the day or the week, are in return for the goods produced during that period.

Rodbertus does not seek to deny or obscure the fact that the service performed for society by the capitalist class is very great. The skill and knowledge shown by them in starting and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

managing industries he recognizes as labor of a very high quality. As such it is entitled to its just reward. It is labor which society cannot dispense with. The laborers themselves cannot perform it. The function of the manager must be retained, but his reward should consist only of wages of superintendence. Labor, in the broadest sense of the term, is the sole productive agent, and therefore is entitled to the whole product. But now the capitalist class receives it all, not because of the labor which they have performed, but because they are the possessors. All income in excess of the just return for labor, whether derived from land or capital, Rodbertus calls *rent*. This is what a man obtains without effort on his own part. It is the result of expropriation, robbery. He divides it into ground-rent and capital-rent, and the latter into interest and undertaker's profit.

From the point now reached it is easy to understand Rodbertus' theory of pauperism and crises. If rent, profits, and wages are paid from the total national income, it follows that a rise of the two former, or of either one of them, without a corresponding decline of the other, will be followed by a fall of wages. Rodbertus holds, with Ricardo, that under the system of free competition wages tend toward the minimum point, *viz.*, that amount which will supply the barest necessities of life. The forces which operate against this tendency are increase in the efficiency of labor, and checks to the growth of population. National productivity has been greatly increased, but most of its results have passed into the hands of the capitalists. That this is a necessary result appears when we examine the origin and present condition of the laborers as a class. Their ancestors were slaves in antiquity and serfs during the middle ages. When they emerged into freedom, ignorant and destitute, they found themselves in competition with an active, intelligent class furnished with capital. It was not a struggle between labor and the owners of land, alone and unassisted; but labor was forced into competition with a class possessing in addition all the fruits of a thousand years of civilization, developed during the ages of slavery and servitude.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Hence the start was unfair, and its effect has continued till the present. As the entire product of the slave's labor belonged to his master, so it continued to belong to his employer after the slave became a wage-worker. Instead of labor and property co-operating in the production of wealth, a form of contract was entered into. But contracts between members of two classes so situated cannot be fair. The laborer has only his one commodity, labor, which he must sell at once, or lose entirely. It is like "selling the harvest upon the stalk." Also, the general use of money in exchange is unfavorable to the laborer. It separates him further than ever from his product. Its purchasing power may differ from the value of the laborer's share of his product, nominal from real wages. Money is used when the employer pays his men, and again when it is expended in the purchase of the real wages. Whenever exchange is resorted to, the laborer comes under the operation of the so-called natural law of supply and demand. They always work to his disadvantage, because he is not in a condition to compete on an equality with the capitalist. Furthermore, the vigorous competition between capitalists makes cheapness a necessity. The reduction in cost which this necessitates is usually made at the expense of labor, because it is the weaker party. To the employer wages seem to be a part of the cost of production, and hence they are forced down.

The above considerations explain the fact that wages tend toward the starvation point. Competition can be free only between classes of equal economic strength. Between classes of unequal strength it is slavery under the name of freedom. The spirit of the system is seen in the prevailing doctrine that labor, meaning the laborer, is a commodity, a chattel, which forms a part of the cost of production, and is subject in all respects to the operation of supply and demand. Statistics confirm these statements, for they show that throughout Europe the wages of common laborers have never risen, except for short intervals, above the point of absolute need. The laborers are practically in the condition of serfs. On the other hand, profits and rent have risen greatly, the former more than the latter,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

because the productiveness of manufacturing and transportation has increased faster than that of agriculture. Improvements in production under the present system are therefore a curse rather than a blessing. The defenders of free competition assert that everything which adds to national wealth is a good, and everything which takes from it is an evil. This is not necessarily so. Every addition made to national wealth may help the growth of inequality. While the laborers at one extreme of society sink into pauperism, the plutocrats at the other extreme pass from the struggle to increase productiveness, to the struggle for gain, pure and simple. From that they pass to rivalry in the pursuit of enjoyment. From this develops luxury, followed by moral corruption, which is the last stage in the process of social decay.

In his theory of pauperism Rodbertus discusses the movement of wages in reference to the minimum point. But there is another point of comparison. The expressions, wages are "rising" or "falling," are "high" or "low," may be used in another sense. This is with reference to the total product of labor. Wages may be absolutely high, that is, far above the least amount necessary for the support of the requisite number of laborers, and yet form a small part of the total national product. They will then be relatively low. The total national income may increase so much faster than wages, that the rate of wages may be slowly rising, though at the same time a continually diminishing share of the national product goes to the laboring classes. This is actually realized under the system of private property and free competition, and from it is derived the only satisfactory explanation of commercial crises.

Crises appeared with the advent of the modern industrial system, and have kept pace with its development. Instead of disappearing, they are becoming more frequent and severe. They may arise from the failure of producers properly to adapt supply to demand. That of itself reveals a weak point in the present social system. The fact that capitalists attempt nothing unless they think profit can be made out of it, and act upon the most imperfect knowledge of the conditions of the market,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

leads to reckless and blundering ventures, which end in great and constantly recurring losses. But this, Rodbertus says, is by no means the source of modern crises. Their symptoms he describes with great ability. They are uniformly preceded by a period of high prices, great productiveness of labor and increase of capital, high wages, and fall in the rate of interest. The banks overflow with deposits; credit is so easy and confidence is so great that multitudes of new enterprises are started. Suddenly, as if by a stroke of lightning, the situation is changed. A stagnation occurs in some of the leading branches of a nation's industry, which extends to all forms of business. The prices of all commodities fall rapidly. Property and incomes shrink in value till all find it difficult to meet obligations, while many temporarily suspend payment or become bankrupts. Production is greatly curtailed. Thousands of laborers are left without work, and hence without food. The capitalist and laborer alike suffer. Sometimes a shock to credit begins the collapse; again, a poor harvest, or some important loss of capital. But most frequently it begins with a fall of prices. The channels of trade become obstructed; but in this case, unlike a river in the time of freshet, there is no overflow and enrichment of the surrounding wastes. The current of production stops and remains fixed in its channel. Abundance and want exist side by side, but cannot meet. Only after this condition has lasted for an indefinite time, does production begin slowly to revive, and better prospects appear for capital and labor.

Crises begin at the centres of industry and trade, where capital is most abundant and credit most developed. Commercial prosperity furnishes the conditions under which they thrive. In the most advanced nations they are felt most severely. They originated in England, the city of the world; but the development of railways, of steam navigation, and of stock transactions, has spread their effects over the two hemispheres. The crises since 1830 have affected all the western nations, and each has been more severe than its predecessor. The interval between the first and third crises (1818–1836) was eighteen years; that between the second and fourth (1826–1840)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

was fourteen years; that between the third and fifth (1836–1847) was eleven years.

Since the growth of national debts and the issue of so many securities by corporations, stock transactions play a part in crises so important as to obscure their real nature. They are not money crises, but trade or community crises. Merchants who have imposed their superficial views on society explain them as the result of excessive speculation. But the real cause is to be found in the explanation of the first symptom; *viz.*, the fall of prices. Rodbertus, in his history of the crisis previous to 1848, strives to prove this point. He claims, for example, that the crisis of 1837 in England could not have been caused by the revolution in Lisbon, which depreciated Portuguese bonds. Large amounts of Spanish securities were held in England, but in 1835 a serious revolution occurred there without causing a panic in the English market. If a collapse of credit caused the panic in the former case, it should have produced a similar result in the latter. The fact, however, is that the year 1837 was preceded both in America and England by a period of most rapid increase in national wealth. The extent to which railroad building was carried is one evidence of this. But there was the greatest activity in every branch of agriculture and manufacturing. The introduction of machines vastly increased the labor power. Credit, which aids production by removing the necessity of waiting till new capital is created before enterprises can be started, was called into active service. Banks of issue, the most powerful organs of credit, gave their impulse to industrial progress. Under these circumstances great enterprises flourished, and it was *these* which produced a mass of commodities, the accumulation of which clogged the channels of trade. The crisis which followed, though introduced by a money panic, was really a sudden fall of prices in all the industrial centres from America to Constantinople. These phenomena are repeated in all crises. The all-important question then is, Why do commodities accumulate in this way? Production is only a few steps ahead of consumption; and if the entire wealth of any country were distributed equally among its

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

population, each individual would receive only a small amount. Why are not commodities taken off the market as soon as they are produced? The reason is, that the purchasing power of the masses, nine-tenths of the population, does not keep pace with the productiveness of their labor. This is the correct form of statement, rather than the one used by Malthus and Sismondi, that the producing power of the laborers exceeds their purchasing power. If each individual or class of producers received their entire product, the supply they bring to the market would equal their demand. These crises would be impossible, because purchasing power and productiveness would balance. It matters not whether the share of the laboring classes be absolutely small or not; so long as it does not increase as fast as their ability to produce, with the aid of all the machinery which is in operation, crises must be regular visitors in modern society. No class is responsible for their occurrences. Capital suffers from their effect as much as labor. The fault is in the system; it is organic. Attempts to restrict the proper development of credit, like the Peel Bank Act of 1844, will not cure the evil. We need all the aid that credit can furnish. Production should be extended in its scope rather than restricted. All that is needed is a more equal distribution. But can that be obtained under the system of free competition? Rodbertus holds that it cannot. Pauperism and crises are so related that the one cannot be removed without the cure of the other. Pauperism makes crises possible, and crises defeat all attempts of the laborers to escape from their poverty. Here lies the fatal contradiction which is to cause the overthrow of modern society. It is as real and deep-seated as that which prepared the way for the triumph of the barbarians over Rome. Now, however, the barbarians who threaten society with their attacks live within, rather than outside its borders. They are not slaves, excluded from the protection of the law, nor serfs, possessing a limited number of rights, but citizens, endowed with full political equality. They see in political freedom only a form, without substantial advantage. So direct and intense is the conflict of interests between capital and labor that Rodbertus sees only

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

revolution ahead, unless the state interferes to secure peaceful and regular developments.

The treatment of the problem of land and rent occupies an important place in Rodbertus' works, but only a passing reference can be made to it here. He subjected Ricardo's theory of rent to a searching criticism, holding that it does not explain the origin, but simply deals with the fact of rent. He brings out the points which have been made familiar to English readers by Carey and Jones, but adds others of greater scientific value. He would substitute for the doctrine the idea which has appeared already; *viz.*, that rent, like profits and interest, is the product of our social institutions. It is one of the forms under which the laborer is robbed of the product of his effort. "The theory of rent," he says, "is the answer to the question why persons who perform no service participate in the original distribution of goods." Again he says: "The taking of them out as a special share" — meaning rent and profits — "*is* private property in land and capital." Rodbertus seeks to explain the recent growth of indebtedness upon land throughout Germany, wholly from the fact that it has been treated as capital. By the legislation of the present century it has been brought under the influence of free competition. It is exchanged as if it were capital, and its value is expressed in the terms of capitalized rent. Thereby it has been subjected to the fluctuations of interest and of speculative demand. The result, in brief, has been that the owners of it, and dealers in it, have become involved more and more deeply in debt. But land, according to Rodbertus, is not capital at all. It is simply the source of rent. That alone measures its value. To treat land legally as if it were capital results not only in confusion, but in the loss to the landholding class. The principles underlying real credit are quite different from those of personal credit. Therefore Rodbertus urges that the rent-principle of the middle ages be brought again into use, and sees in that, together with the establishment of a system of country banks, a specific cure for the evils under which German agriculture is suffering.

The most important reforms proposed by Rodbertus are those

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

intended to remove the great social dilemma, the struggle between labor and capital. Unless this and the evils which come from it are cured, society will go to pieces. But they will be cured, he says, and that by means of a long process of historical development, continuing at least five hundred years. This process will not go on of itself. It must be a self-conscious evolution, guided by the controlling organ of society, the state. The evils of the present system will probably make themselves felt much more keenly than at present. But the sense of suffering caused by them will force society into a course of development which will lead ultimately to a complete transformation, a new social order. It is absolutely necessary, then, to discern aright the goal toward which we are tending. Then only can appropriate measures and a safe course of policy be chosen. The social question cannot be solved by any political change. It lies deeper than forms of government; it exists under all forms. It can be solved under a republic or a monarchy, though the latter offers advantages towards its solution, which the former does not possess. As already indicated, the process of change must be gradual, not sudden or destructive. No valuable human institution, whether in the domain of thought, morals, or economics, should be sacrificed. The production and distribution of wealth should be continued at least upon their present scale, and the way should be opened for extending them. Capital must not be swept away, but a balance to the power of capital secured. Under any tolerable form of society, laborers, landholders, and capitalists, in the sense of managers, must exist together. The ordinary laborers cannot manage the works of production. If they should successfully attempt it, the result would be the universality of corporation property, the worst and most tyrannical of all forms of ownership.

For this reason, and because Lassalle proceeded by agitation and antagonized the government, Rodbertus would have nothing to do with him. The two agreed in their theoretical views and ultimate objects, but they could not agree as to practical methods. It appears from his correspondence that Lassalle repeatedly begged Rodbertus to aid his movement, to offer some positive

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

programme. He accused Rodbertus of being visionary, and promised, if he would present something definite and tangible, to take it into consideration. But all appeals were in vain. Rodbertus insisted that the laborers were not ready for action. They would not unite, because community feeling was not developed within them. They were too ignorant of the problem and the conditions under which it must be solved. They must pass through a long course of training, intellectual as well as in the school of experience, before they will be ready to attempt the final solution. The other classes need developing also, as truly as the laborers. The moral tone of society must be raised, its will power increased. Class antagonism should be discouraged rather than intensified. The nation must move together under the lead of its government, if any true social progress is to be made. Strikes will be of no avail. They have not benefited the laborer's condition in England. The methods of trades-unions are open to serious objection. Association is the all-important thing, but it must be managed on peaceful principles.

The difference between the spirit of Rodbertus and that of Marx appears here very clearly. The latter held that individuals could accomplish nothing as such. The evils of society must develop until they become intolerable; and therefore the course to pursue was to increase the evil as rapidly as possible by agitation and attempts at revolution — *Theorie der Bösheit.* That would lead to a violent collapse and the establishment of the new system by force — a Napoleonic era.

The following quotations will make Rodbertus' views on this point still clearer:

> The Social Question is the problem how peaceably to transfer society from our system, based on private propety in land and capital, to the higher order which is necessarily and historically to follow it, and the signs of the approach of which are already appearing.
>
> The Social Question is not to be solved upon the streets with paving stones and petroleum. Decrees might be obtained which would suffice. But by these the Social Question would be smothered in the cradle. However, it has already grown up above our heads, and cannot be

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

solved at present. All we can now do is to organize. We must proceed carefully, and not destroy the plant by rough usage. Social peace, unified political power, great preparations and deep-laid combinations, made quietly and with order and energy, — these are the conditions of the solution of the Social Question.

If conservative means the conserving of accursed plunder, then there is nothing more anti-conservative than the Social Question. But if conservative means strengthening the power of the monarchy, peaceful reforms, harmonizing of social classes under the ægis and according to the rule of *suum cuique*, then there is nothing more conservative than the Social Question.

The works of Rodbertus abound in passages similar to these. One of his favorite illustrations is that the transition to the new order will be like that from the invertebrates to the vertebrates in the animal kingdom. Now the state has as little organic adaptation to the rest of society as the head would have, if it were placed upon the back of an insect. The state should be placed at the top of society and in organic connection with it, so that its guiding influence may be felt through the whole body.

But it must not be imagined that Rodbertus was destitute of a practical programme. Although he avoided agitation, he was not simply the leader of a philosophical school. He distinguished specific diseases in the body politic from the general malady. To the former he would apply specific remedies, and that immediately. A case in point is the lack of credit accommodation and the burden of debt from which the German landowners are suffering. The specific remedy which he would apply to that is the establishment of a system of banks, and the introduction of the rent-principle.

Relative are also to be distinguished from final solutions. The former will only prepare the way for the latter. The final solution of the social problem will be found where the system of private property in the instruments of production has been succeeded by that of pure income property, and when the management of production and distribution has been assumed by the state. This involves a transition from one social order to another radically different, from the present to the ideal state.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The new social order is so remote that anything more than hints at its nature would be useless now. But there are preparatory reforms, which can be carried out under the present system. Among these are statistical inquiries on the largest scale concerning the hours of labor, the amount of work performed, and the income of the laboring classes. These should show both what is, and what should be. They should be gathered from existing conditions, and issued with such promptness that they can be used as the basis of legislation. A reform should at once be begun in the system of taxation. The rule to be followed is that the heaviest rate of taxation should fall on money capital, especially when it exists in larger amounts; the next lower on other movable property; the next on land; and the lowest on labor. The necessities of life should not be taxed. A heavy tax should be laid on inheritance, increasing in amount as the relationship of the heir becomes more remote.

The above reforms will operate indirectly toward the solution of the labor problem. The introduction of the "normal labor-day," and of factory inspection, will tend directly to that end. In the former case the only object aimed at, for the present, should be to restrict the hours of labor to a reasonable length. Ten hours would be a good average, but this could not be enforced in all forms of business. All necessary allowances should be made. Sunday labor should be discouraged. The fixing of the normal day's labor is held in reserve. The English system of factory inspection, with some modifications, is recommended.

Another class of reforms are those which contain the germ of the new *régime; viz.*, the extension of state enterprise. The railway, telegraph, post-office, and tobacco monopoly are illustrations of this. The history of these under government control shows that the economic sphere of the state can be enlarged. On this question Rodbertus claims to occupy a position between the Manchester school, which rejects all state interference, and the more extreme socialists, who say that state control is the best under all circumstances. It is the best under certain circumstances. It may improve the organization of society;

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

it is the only way in which to prevent the extension of monopoly; the state may thereby secure more cheaply than otherwise the articles which it consumes. The principle is right; the only question is that of its application. The aid of the state must not be invoked in a spirit of favoritism toward the laborers, or any other class. Its essence is that it substitutes public for private interest, as a controlling motive. It asserts the prerogatives of the community, as against those exercised by the officials of a joint stock company. If it had control of railways and bank notes, it would have a powerful weapon to use against crises. The domain of state activity, meaning by state the central organ of society, changes with historic progress. No hard and fast bounds can be set to it. Its limits are never the same in any two periods of history. In general, as the social organism becomes more complex and highly developed, the activity of the state increases both extensively and intensively. All signs indicate that we live in such a period.

After society has become sufficiently accustomed to state control, and methods of administration have been elaborated, then the time will be ripe for more decisive measures. The period of transition will then be entered upon. The statesman must then aim at obtaining for the laboring classes the highest available rate of wages. Even though we hold that the wage-fund theory is false, there must be, at any given time, some limit to the rise of wages. A certain sum in each line of business must be fixed upon and striven for by the state. This should not be so high as to hinder production, nor so low as to injure the laborers. It is useless to wait for such work as this to be done by the church, education, self-help, or by letting things go as they please. The state alone can effect it. But it must be careful not to infringe upon the freedom of inheritance, of alienation, or of mortgaging landed property; upon the right of placing or disposing of capital; upon the right of settlement, in its broadest sense; and the right to choose a calling. All these must be preserved intact. The state must solve the labor problem on the basis of a pure wage system, and it takes the initiative simply because employers and laborers will not do so.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Not only must the state secure a rate of wages which is up to the necessary limit, but it must obtain for all laborers an income, the growth of which shall keep pace with the increase of their productivity. It will therefore be necessary from time to time, as the productivity of labor increases, to increase the amount of income. This means the periodical fixing of the rate of wages by government according to the results obtained from statistical investigation. If this be done, labor will cease to be a commodity, at the mercy of the law of supply and demand.

It is clear that by the time this point is reached, private, or rent-bearing property in the instruments of production will have ceased. Collective, or state property will have taken its place. Capitalists and landowners will not be expropriated, or arbitrarily dealt with. They will still continue to manage their enterprises. But they will do it, not according to the system of free contract, but under the condition prescribed by the state. This will be that they surrender to the state, and through it to their employees, all their profits which exceed fair wages of superintendence. They, like all others, will be rewarded in proportion to their labor, and to that alone. All accumulation of capital from profits will cease. All classes of producers will be viewed solely from the standpoint of labor. Property will not be abolished, but it will take the form of income-property; that is, the right of each to the full product of his labor, minus that which the state will take for its own support. National income will evidently consist of two parts, capital and income-property; the former that portion of the product which is devoted to future production, the latter the part consumed. There will be no need of waiting for capital to accumulate before starting enterprises, because all will take their pay from the product as it is produced, and the state will see to it that demand is adapted to supply. Artificial monopolies, and the waste arising therefrom, will be avoided.

The central point in Rodbertus' theory of the ideal social order is the adaptation of national supply to national demand by the state. It is only in that way that the mischievous influence of competition can be abolished and the interests of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

community secured. Then only can the results mentioned above be obtained. The officials of the central government must ultimately superintend production and distribution. When they have obtained this power, they will periodically ascertain by statistical investigation the extent and character of the social demand. They will then so guide production that the supply of commodities shall always correspond to that demand. This problem, which seems so vast, he claims can be solved by means of the principle of time-labor.

We may suppose that the normal labor-day has long been established. If we combine with this the idea of normal day's work, we have the conception of time-labor. The quantity of labor-power expended by a workman during a normal day, though varying greatly according to the nature of the occupation, the skill and energy of the laborer, *etc.*, may be reduced to an average. This will be a normal day's work, the work performed by an average laborer. This, under the name time-labor, may serve as an ideal standard of measurement. Its objective form will be the product of the day's work. Now the productivity of all laborers in each branch of industry can be ascertained and expressed in the terms of the standard. But the sum of these, at any time, will be the social supply. The work of calculating averages must be done for each line of business separately. It will be a difficult undertaking, but the fact that H. Peters, the architect, working with Rodbertus, has performed the calculations for the labor of a carpenter, shows that it is practicable. The state must cause the estimate, and hence the standard, to be changed from time to time, as the productivity of labor increases.

The work of distributing the supply of commodities so as to satisfy the social demand will be managed as follows. The value of all products, as well as the efficiency of labor, can be ascertained by comparing them with the standard. By means of this a wage, or share in the product, can be given to each laborer, which exactly corresponds to the service he has rendered. If a laborer in half a day produces a commodity similar to that made by the average workman in his trade, working

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

with average skill and energy during an entire day (the standard), he will receive a full day's wages. If it takes another laborer two days to perform the same work, he will receive no more than a day's wages. Thus not only is a means devised for measuring the value of all commodities in the terms of labor, but we can, with its help, distinguish qualities of labor and assign rewards corresponding to efficiency.

The last step in the process of establishing the socialistic state will be taken when a form of paper money adapted to the needs of such a community is issued, and magazines for the storing of products before their distribution are built by the government. To these magazines all commodities will be carried after they are produced. Notes or certificates of work will be given to each producer by the state in amount equal to the labor he has performed. On presenting these at the public warehouses, such products as the laborer has earned can be obtained. In parts of this plan the influence of Proudhon can be traced.

Such is the outline of Rodbertus' theory of the socialistic state and of the method of transition to it. He claimed to have thought it out even to its details, but forbore publishing a complete picture of his ideal, because the public was not ready for it. It is the ideal, however, toward which all scientific socialists of this generation are working. Because only hints of his views concerning the ultimate solution of the social problem were contained in the works issued before his death, some have claimed that Rodbertus was not a socialist. There has been a tendency to class him with Sismondi, a critic of existing society, but without positive plans for the removal of its evils. But Rodbertus, as truly as Marx, considered the abolition of private property in land and capital to be the only sufficient remedy for our social ills. That proves him to have been, not a man with socialistic tendencies simply, but a socialist. He looked forward to the development of a form of society wherein the state should assume entire control of production and distribution.[1] Compe-

[1] For full statement of legitimate conclusions from Rodbertus' doctrines see Schäffle, Bau und Leben des socialen Körpers, Bd. 2, S. 457.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tition, exchange, the regulation of prices by the action of supply and demand, would cease. Money would no longer be needed. Credit and all its institutions would disappear. All producers and consumers would be regarded from the standpoint of labor; wages would be the only form of income. Public officials, elected or appointed for each district, would ascertain the demand for the various commodities produced there, provide for their supply, and fix the rates of wages according to the rule described above. All these officials would be under the control of a department of the central government. The production and distribution of wealth for the entire nation would be under the supervision of this central organ. The books kept by the state would contain the most perfect picture of every department of the economic life of the nation. Commodities, when produced, would be stored in public warehouses, and thence distributed by means of certificates of work. The state would take immediately what was necessary for its own support. Hence national debts and the modern system of taxation would disappear. With the surplus remaining after necessary expenses were paid, the state might patronize literature, science, and art on the most magnificent scale. Public education would be carefully provided for. Freedom of trade with other nations could be maintained by the socialistic state.

Rodbertus, we repeat, always insisted that no valuable social institution should be sacrificed in the transition to the new order. He meant by this that individual freedom in the choice of an occupation, incitement to skill, energy, and carefulness in production and in the work of the state officials should be secured by means of an appropriately graded system of wages. Also he would not abolish inheritance, only restrict it. Therefore the family could exist in its present form under the new system. Consumption would be for the most part unrestricted by the socialistic state. There would be no encouragement to amass large fortunes, because they could not be employed productively. Hence laws against luxury need not be very numerous or severe. Moreover, pauperism would disappear with its causes, and all the poorer classes would be able to maintain independent homes.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Rodbertus evidently thought that the church could be maintained and its operations carried on as well under the socialistic, as under the present system of society. Of course its alliance with capital, if any such there be, must cease. That, viewed from the socialistic standpoint, would be the completion of the work of the Reformation. But perfect freedom of thought and worship would be consistent with the spirit of the new system, and there might be less temptation to worldliness and more devotion to good works than now. The essentially Christian element in socialism, which is emphasized by Laveleye and other writers, is not pointed out by Rodbertus, because he treats the subject wholly from the standpoint of the economist. But it is in perfect harmony with his general position and spirit. He is not materialistic, not irreligious, not destructively revolutionary, not exclusively devoted to the interests of one class as opposed to those of the others. His aim is by a system of checks and balances to secure all that is valuable and put an end to strife.

If this economic millennium is ever to be realized, it of course must be preceded by a most important change in the spirit of society. Externally, the introduction of the socialistic state would be effected by a development of the system of administration. The idea was hatched in the heads of Germans who have always been accustomed to an elaborate administrative system. The spirit of officialism has always been dominant in Prussia. Political and economic freedom in that country was almost thrust upon the people, not extorted by generations of conflict with oppressive governments. Jealousy of state interference, so much of it as exists, has for the most part been imported from France and England.[1] Therefore the confidence shown by the German people and by the majority of their political philosophers in the capacity of the state to solve all problems can scarcely be understood by an American or Englishman. They are accustomed to a highly organized civil service. A most important object of the system of national education is to prepare for official life. It is considered

[1] J. R. Seeley, Life and Times of Stein.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

an honorable calling. The best talent of the country, throughout this century, has been devoted either directly or indirectly to the service of the state. Twice, once at the beginning of the century, and again in our own time, the greatest statesman of his generation has been placed in control of affairs long enough to impress his personality on contemporary events. The rapid material progress of Germany since 1870; the successful operation of the railroads and telegraph by the state; the fact that the Prussian government has always controlled the mining industry, forests, and large public domains, are considered good omens of success if the state should continue to extend the scope of its activity. Therefore, most German theorists acknowledge the abstract possibility of such a perfecting of the science and art of administration, that much of raw production, manufacturing, and transportation in their own country could be carried on by the state. This, so far as it goes, is in agreement with the view of Rodbertus. But he, as well as they, realized fully that a long period must elapse before any change of this character could be brought about. Socialism, according to him, is the opposite of individualism. Solidarity, community feeling, public spirit, is the motive of action to which it appeals, while self-interest is the peculiar motive of individualism. He would by no means exclude the latter, but he would bring the former to a place of equal prominence with it. He did not believe in state-help alone, but in self-help supplemented by state-help.

But before the socialistic ideal can be realized, the grosser forms of self-seeking must disappear. Men must abandon their selfishness to a degree. Honesty must prevail, both among the official class and outside. Without the support of a public opinion in harmony with socialism, the socialistic state would be doomed to failure. No system of administration, however well devised, would work smoothly under any other conditions. So long as the capitalistic spirit prevails in society, capitalism must be maintained. Socialism, if established now, would have to rest upon force, and that, according to Rodbertus, is not the condition of progress. Hence he urged that a long course of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

social training is necessary before the establishment of the socialistic state can be even attempted. Marx and Lassalle never insisted on this, and therefore their teachings have a more revolutionary character. The object aimed at is the same, but the method of reaching it is different. It is not so much upon the fact that Rodbertus was the first to formulate the theory of the socialistic state (1837–1842) that his claim to be the leader of that school of thought rests, as upon his clear appreciation of the only way in which the ideal can ever be realized. He thought that a greater degree of social equality could be secured without encroaching seriously upon essential freedom. But in order to do this, the work of reform must not be pushed faster than society is willing to advance. The legal bonds within which society moves should always correspond to its inner spirit. When, however, the time is ripe for an important change, it can be made quickly, as was shown by the experience of Prussia between 1807 and 1820. During that short period, under the leadership of Stein and Hardenberg, the feudal system was cast aside, and freedom of competition, together with a whole series of administrative reforms, was introduced.

In order to criticise aright any system of thought or public policy, it is necessary to know the best it has to offer. When we denounce the average labor agitator, or the statements contained in the manifestoes of the International, we do not necessarily attack socialism. It would not be just to hold the theory of individualism or free competition responsible for the exaggerated claims of some of its advocates. Socialism is a system of economic thought, standing over against *laissez faire*. It is the outgrowth of social conflict and of the development of historic study. During the last twenty years it has certainly wrought a great change in theoretical political economy. That the problems of distribution are recognized and treated now so much more prominently than by the older writers, is due to socialism. Its doctrines, that labor in a complex society is the only source of value, and that under the influence of competition wages must remain at or near the starvation point, are

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

exaggerations, borrowed from English economists, which can be easily detected and exposed. But they have helped to correct perhaps as serious exaggerations on the other side. The theory that free competition always operates beneficently has, as its correlative, the Darwinian hypothesis of natural selection applied to society. Humanitarian impulses are sentiment; failures are always the result of vice or, what is worse, weakness. The advocate of *laissez faire* starts with the individual, forms his premises and draws his conclusions from the standpoint of the successful producer and distributor of wealth. The socialist starts from the opposite pole, the community; seeks to explain economic phenomena from the social standpoint, and keeps ever in sight the needs of the nation as a whole. These views supplement one another. The policy of every civilized nation is the result of the interaction of the two. If socialism is now considered revolutionary, individualism was in much the same position a century ago.

In view of the theory stated in this paper, several of the stock arguments against socialism fall away. The system is not necessarily materialistic or irreligious, though some of its advocates may be. It does not propose the abolition of property, or the levelling of incomes. It would not abolish freedom for the sake of establishing equality. It is not necessarily revolutionary, or anti-conservative. If its ideal can ever be reached, self-help would not be sacrificed to state-help. Socialism has no appreciable connection with protectionism. The question then between socialism and the present system is not one of overwhelming moral importance, on which depends the safety of the family, the church, and the individual. They can flourish or decline under either *régime*, according to the moral tone prevailing in society.

The question is one of expediency, of ways and means for securing the maximum of social well-being. Under which system can society perform its functions the more economically, with the least waste and the largest total advantage? In order to be successful, the socialistic state would require a standard of public and private morality far above the average attained in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED.

our best communities to-day. Official life must be freed from all corruption, from all tendencies to self-seeking, self-indulgence, or greed. Party government would have to undergo important restrictions and limitations. Patriotism must always exist among the people to a degree now only realized by a few during a great national struggle for liberty. The average man must be so highly developed morally, that he will be ready to sacrifice personal gain and enjoyment for the good of the community. To this age, a system with such requirements can be only a dream, an aspiration. It cannot be a practical solution of the labor question. Under the conditions stated, any social system would work smoothly.

Another question of prime importance is, whether so heroic a measure as the substitution of state for private property is, or ever will be, necessary. Is inequality developing so rapidly that its progress cannot be checked by forces which society, even in its present form, may call to its aid? The socialists underestimate the incalculable service rendered to society by freedom of competition. The induction on which their sweeping conclusions are based is inadequate. This is notably true of Rodbertus; and in the case of Marx, though the facts adduced are more numerous, they are all drawn from one side. The conclusion is not a new one that socialism, as a criticism of existing society and of some lines of economic thought, is rendering most valuable service. A healthful scepticism of schools and policies is produced by it. But as a practical programme it has little to offer which views of a more moderate character cannot supply.

HERBERT L. OSGOOD.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THEORIES OF PROPERTY.

WHEN Hobbes and Locke, going behind the simple fact of private property, long settled as an elementary principle in the organization of society, sought to ground the right on a philosophical basis, the object in view in their speculations was political rather than social. But social institutions, however confirmed by immemorial usage, were sure to be subjected more and more to the searching analysis of modern reflective thought; and the theory of property has since been elaborately discussed from widely different points of view by philosophers, philosophical lawyers, economists, and social reformers. All thinking on the subject, however one-sided or imperfect, has contributed, as even the most revolutionary criticism of private property to-day is tending to contribute, to the elucidation of the basis of the institution and to just conceptions of property rights. As the development of civilized human life has involved the development and confirmation of private property, so the higher progress and conscious evolution of society has been calling forth a profounder comprehension of this right in its relations to the nature of the individual and the observed wants of society; the individual right being first and long emphasized in theory, while increased attention is of late directed to the social claim. To point out and trace the influence of the leading ideas and tendencies in this phase of modern thought will be the aim of this paper; a brief survey of the development of private property rights and of property conceptions down to the modern period being a needful preliminary.

Mirabeau said truly that liberty never was the fruit of a doctrine worked out in philosophic deductions, but of every-day experience. So private property, which we are wont to regard as essential to liberty, was the product of experiment rather than the conscious device of reason. Sir Henry Maine and other authorities have given us the strongest reason "for

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

thinking that property once belonged, not to individuals nor even to isolated families, but to larger societies, composed on the patriarchal model"; and actual examination of extant village communities affords support to the conjecture "that private property in the shape in which we know it, was chiefly formed by the gradual disentanglement of the separate rights of individuals from the blended rights of a community."[1] Progress in the history of nations is certainly marked by the recognition of private property; and by an increase as well in the amount and variety of individual compared with public property or unappropriated good, as in the abstractness and far-reachingness of the individual claim. This indicates that society is unconsciously adapting itself to the necessities of altered conditions. Practices which may be introduced accidentally, and which are at first exceptional to the current usage, become habitual and universal by experience of their advantages, and the practice is finally vindicated by political authority. There is an unconscious logic in the rule which thus comes to be established; and though, as Aristotle held, "the law is reason," the right reason of a particular rule, its true theory, may not be rightly apprehended by the first jurists who attempt to interpret it. Nor, probably, were the moral claims of the institution of private property at first advanced in its favor. The ethical feeling of the society would *prima facie* be rather against it, though its establishment were yielded to necessity. Communism in land, *e.g.*, is a system of property which is useful in all the early stages of society, since it binds together the individuals of the tribe by the strongest tie. Mr. Bagehot has clearly brought out in his *Physics and Politics* the prime necessity of binding together the society in its forming stages: everything which tended to individualism would naturally be discouraged by the tribal feeling of self-preservation. To love thy neighbor and hate thine enemy is easy when property is the affair of the tribe, and the property right is limited to the tribe. The notion of property being identified with that of the permanence and unity of the family itself,

[1] Ancient Law, ch. viii.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the progressive decay of common property may well have been regarded as a step in the direction of material more than of social or moral progress. "In the myths, agriculture, which brought about division, is a curse, a fall from a more perfect stage — that of the nomads — to a lower and imperfect one."

The right of private property was vigorously asserted by the Romans and elaborated in their law. The Roman property laws were as far as possible removed from modern socialism. The close binding up of property with the person of the owner was not, however, due to conceptions of the person similar to those of modern thought. The individualistic element in Roman property law is due, in part at least, to the influence of the time when the claim to private property was especially founded in the personal prowess of the warrior.[1] The principles of Roman jurisprudence referred the right of property to "first possession, labor, succession, and donation"; occupancy of things without an owner being considered as the principal title conferring property.

The institutions, modes of thought and life in the middle ages were unfavorable to the development of the feeling of individual right in property, though the way was slowly preparing for this. The influence of the Christian conception of the sacredness of the human person was operating silently; the laborer was not absolutely enslaved. And the power of the military chief over his domain land gives an absolute conception of private property, which is transferred to individual ownership generally after the dissolution of feudal institutions. However, so long as feudalism held its sway, modern property conceptions could not make way. The rights of labor had no standing, and could have none; for, as Heron points out, in his *History of Jurisprudence*, "if any feudal tenant were allowed to acquire the absolute property in the improvements effected by him, the whole feudal system of mutual

[1] Gaius, in his Institutes, IV. 16, explains the ceremonial use of the spear in the old court of the *centumviri*, and of the *festuca* in the oldest form of civil procedure *quasi hastæ loco*, on the ground that the ancient Romans "maxime sua esse credebant quæ ex hostibus cepissent."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

dependence and obligation would have been at an end. The feudal baron expressed his title in the robber-motto: *Per Deum et ferrum obtinui.*" The title thus imperiously claimed was the less resisted, because there was then some recognition of tenants' occupancy. The bucolic contentment of the simpler period, the absence of trade and intercourse to awaken multifarious desires, the influence of religion, all contributed to repress economic individualism. Mr. Sidgwick, in his sketch of *The History of Ethics*, remarks the admiration of the early and mediæval church for the apostolic communism, and says of the attitude of early, and even to some extent mediæval, society toward private property and toward slavery:

> Both were regarded as encroachments on the original rights of all members of the human family; since men were naturally free, and the fruits of the earth naturally common.

Very different were the ideals of that time from those of the industrial age soon to come into view: in the one, poverty canonized; in the other, poverty remanded to the fit society of stupidity and indolence! But even when the whir of industrial activity began to be heard in the middle ages, the spirit and method of work is still comparatively communal. Up to the seventeenth century, Laveleye tells us, there is frequent mention of societies of persons with associated joint property. This system "had to encounter two sources of ruin; one in the spirit of individuality characteristic of modern times"; another in the influence of the study of the Roman law; moreover, "the successive disappearance of serfage and *mortmain* took away from these associations one of the most powerful reasons for their existence."[1]

It is not necessary to point out all the causes — notably the development of industrialism, the growth of the contract-system, and the increase of wealth by trade and commerce — which aided to give that strength to the feeling of right attending private possession, which has in modern times made it so self-asserting. Only it should not be overlooked that with

[1] Primitive Property, ch. xv.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the growth of property man becomes intensely attached to what he owns. In a period in which this spirit is growing to a head, with a parallel development of independent speculative thought, the current absolutist theories of the sovereign's original and divine right over property were as certain to be questioned by thinkers as arbitrary measures of control to be resisted by the interests affected; and in the "social contract" theories, the spirit of liberty and individualism finds a mode of expression. But even in the British Parliament, in 1601, Mr. Sergent Heyle asserted: "All that we have is her Majesty's, and she may lawfully, at her pleasure, take it from us. Yea, she hath as much right to our lands and goods as to any revenue of her own."[1]

Moral philosophers and jurists, since the modern period began, have attempted to find a philosophical basis for private property, to establish the rightfulness of the rights over things which the law allows to the individual. Later, the economists have aided by setting forth the general utility of private property; although one of the earlier economists so far pursued the older point of view as to describe property as "a dreadful but necessary right."

The idea of contract, or free convention of individuals, as inducing the state upon the anciently assumed state and law of nature, found favor with thinkers even of opposite schools, both on account of the individualizing tendency in modern thought, and the conscious need of some new and broader basis for law and order in an era of great changes in institutions and opinions. Grotius, in his epoch-making work, *De Jure Belli et Pacis*, expounds the philosophy of property from this radical standpoint, yet founds the original right upon occupation, without labor, emphasizing the traditionally esteemed claim. Of a group of social contract theories which appeared near the same

[1] Hopkins, The English Puritans, 3, 628. — Though this was received "with outbursts of indignation and scorn," it tells us much of the vitality at that time of conceptions now so long extinct that we can hardly imagine how a man of Locke's genius could have found it worth his while to dissect them as he did, and thereby give whatever fame they have enjoyed to the writings of Sir Robert Filmer.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

period, those of Hobbes and Locke have special significance for our purpose, as representing two leading tendencies in the modern philosophy of property: one aiming to ground the right externally in some kind of utility; the other internally or psychologically, in the consciously apprehended capacities and requirements of the human personality.

Hobbes, from the standpoint of a materialistic utilitarianism, seeks a rational foundation for absolutism. By social contract he gets the monster Leviathan constructed: a creation of his creatures, who yield him absolute obedience in return for protection to their lives and property. The contract is one in which the principle of individualism is at once saved and given up. "Propriety . . . belongeth in all kinds of wealth to the sovereign alone." That is clearly pointed out by Hobbes which has not always been clearly seen; *viz.*, that property, as far as it involves the control of what one does not physically possess, does not exist in a state of nature; but he assumes beyond that, that not even a moral claim to it is recognized, for there is perpetual war of each against each, and "everything is his that getteth it and keepeth it by force, which is neither propriety nor community, but uncertainty." Truly, then, were property a clear creation of Leviathan, who might well order it and take of it as arbitrarily as he pleased! But if human nature had really no social and universal element in it, or original germ of such element, no stable government or property right could ever have been developed out of it; the collision of mutually repellent atoms could never have produced a social organism. His psychology, recognizing no universal element in mind, gives no basis for social union. The principle would create anarchy as soon as absolutism.

Locke also adopts the fiction of a contract or convention; but with him it is the consent of a very different sort of beings, *i.e.*, rational and moral ones; and therefore it contains a logical truth, though not a historical account of the foundation of the social order — the truth, namely, that government is by a consent of the governed. "Law," as Grote finely said, "is the public reason of the society, participated in more or less by the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mass of individuals, enforcible upon all who will not participate in it." Locke, in his *Treatise on Civil Government*, deals with a foeman unworthy of his steel, except as representing an entrenched dogma — Sir Robert Filmer, who maintains the absolute right of kings over soil and person, as successors to Adam's and Noah's political authority, and by virtue of the division of the earth's soil among Noah's sons; thus sanctifying with a scriptural title the conceptions of political authority and territorial lordship derived from feudalism. Locke, in full revolt against arbitrary mediæval claims, and in vital sympathy with the movement of his time, grounds government in agreement or convention; shows that the true state of man is the social state; and reaches down deeper than Grotius for the right of property, founding it on labor, and adjudging to each worker the right to have and to save the produce of his work. It appears to him evident enough that the goods of the earth are common to all, in the first instance, but become the private property of one who has "mixed his labor" with them, if there is "enough and as good left in common for others." The chief end of men's uniting into commonwealths is the *preservation* of their property. Evidently, the modern organization and increase of wealth could not have come to pass had only labor been recognized as basis of title, since occupancy must always have preceded labor; and no legislation ever allowed that labor or *specification* was alone a sufficient title to establish property. But Locke, with an insight which was lacking even to the French economists, who made land the source of value, recognized in labor the great productive factor in modern wealth, and therefore an element which must predominate in justifying to the general mind the claim to private property. There is eloquent significance in the fact to which he calls attention, that the man who appropriates land to himself, *by his labor*, does not lessen, but increases the common stock of mankind, by the heightened productiveness of cultivated as compared with natural or waste land. The limit set to appropriation is what one can "make use of to any advantage of life before it spoils," and in the case of land, what we can cultivate, as much

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

being left for others as they require. This point may well have been suggested by the greedy encroachments of English landed proprietors, under feudal title, upon the traditional claims of the people on the soil, by enclosure of commons, *etc.* Certain it is that the anomalous condition of property, produced in England by the feudal ownership of land having become unqualified, with the result of turning populous estates into sheep-walks, has led to contemporaneous reassertion in that country of the people's natural right to the use of the soil; and that occupation alone, when not followed by labor or human industry, is a title sanctioned by the average mind rather on the ground of the exigency of social order than intrinsic justice. In the early stages of agricultural life, it would be a simple enough rule that what any family may clear and till remains their property during use. But in the complexity of modern property relations in old civilized countries, only the most glaring abuse of the right of property would suggest any questioning by society of the use made of it by legal owners.

The tendencies of Hobbes and Locke may well represent two main lines which the modern speculations on property have taken; *viz.*, the characteristically German subjective, and the distinctively British objective — *i.e.*, utilitarian and economic — way of looking at the subject; the French genius being perhaps more influential in brilliant exposition and criticism than in profound theoretic construction. To group theories according to these affinities of method, is, at any rate, more to the purpose of this sketch, than it would be to arrange them in view of the different bases of right of property formally set forth in them; of which Laveleye distinguishes six principal ones. And account must necessarily be taken, also, of the new light thrown upon the whole subject by the investigations of the historical school in jurisprudence, and the now active influence of the modern doctrine of evolution.

The subjectivism of the German mind leads it naturally to approach the problem of the right of private property through the consideration of will and the requirements of personality.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This method of thought, primarily favoring the highest individualism in the interpretation of property rights, is yet capable of supporting quite opposite tendencies, when the personality is viewed rather on the side of its needs than of its energies and responsibilities, and when this view is combined with a broad conception of the nature and ends of the state. Yet ground is also given for the reconciliation of the claims of the individual with those of society, in the conception of personality as truly developed in and through the state, so that the whole draws its life from the parts, and the parts from the whole.

Kant's theory of property, though modified somewhat by his allegiance to a form of the contract idea, is profoundly in accordance with the drift of his whole philosophy, which assigns such central importance and dignity to the human person. In personality and its rights, personality being inviolable, he sought for property a rational and spiritual origin. The *ego* is indeed so exalted in his thought that property rights tend to predominate over social obligations. Thus the *laissez faire* theories as to the limits to state interference and the sacredness of free contract and unlimited competition, which have been so potent in our political and commercial life, derived support from his doctrine and authority.

> It was with the immediate intention of narrowing the sphere assigned to government [says Bluntschli] that Kant and Wilhelm von Humboldt declared the state to be a "legal state" (*Rechtsstaat*), in the sense that its sole duty was the maintenance of the legal security of each individual.

It is an elevating and refining idea (which derives sanction from Kant though developed by later thinkers) that associates property with person and its sacredness. Here is the secret spring of that impulse of rights which speaks in the uncalculating utterance: "Not one cent for tribute, millions for defence!" By reason of their connection with our personality, claims on external good are invested with what Jhering has called *ideal* in contrast with their purely material value. It is this ideal value, as he explains, that makes an infringement of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

one's legal rights not a question of merely pecuniary damage; a materialistic measure which cannot satisfy the requirements of the case.

> In making the object my own I stamped it with the mark of my own person; whoever attacks it attacks me; the blow struck it strikes me, for I am present in it. *Property is but the periphery of my person extended to things.*[1]

Fichte, sharing the profound sentiment of individuality, develops, however, the passive side of its requirements; and thus was "the first in Germany to raise the Social Question." "As soon as any one can no longer live from the results of his labor, that which belongs to him (*i.e.*, a suitable living) is no longer his; the agreement with him is completely annulled, and he is no longer legally bound to respect the property of any one else."[2] This involves provision of work; supply of the needy from the general store; and the transfer to government of a right which all have to watch that each labors sufficiently. Hence socialism of the theoretic variety. Hegel puts the matter in a fashion much more consonant with the average sense, in emphasizing the *duty* instead of the right of property and regarding the distribution of goods as dependent upon industry. Hegel emphasizes the assertion of will over a thing as the source of property right.

"The best German writers have noticed," says Mr. Amos, "that the general effect of law is to enlarge man's empire over the outward world of men and things." This generalization points in the general direction indicated by the great German philosophers for the basis of property right. And it is not as a merely selfish right that it thus fulfils the ends of law. Thus Trendelenberg, in his *Naturrecht*, shows how the recognition of the whole gives to the individual will permanence in the thing, and warrants to him the universal disposition of it by means of which external and separable things become, as it were, man's organs; the acquirer is "invested" with a thing; and what is thus first of all strengthening to the individual is also

[1] The Struggle for Law, Am. ed., p. 55.
[2] The Science of Rights, part ii., book iii.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the invigoration of all. Property, first an instrument of the individual, also serves the moral purpose of the family, the corporation, the state. And as, in the measure that the circle of property grows, the power of the owner is strengthened through the security afforded by the recognition of the whole, the very important deduction follows that the *obligations* of ownership toward the whole increase in the same measure. On the other hand, property being the formed instrument or organ of will, it follows that it, like the person, must be socially protected.

Trendelenberg applies the conception of property as *beseelt*, as the instrument of will, to the various forms of property right, removing arbitrariness from the claims of the law. Property is to be as little subject to conditions and interferences as may be; since the more thoroughly it is subjected to one will, the more it heightens the power of the individual, and through him of the whole. The logical and ethical motives of prescription are worked out from the general principle of property.

In general it is seen that, from this subjective view of its inner ground, private property receives a moral character which tends at once to limit that which can be property, and impart a certain sacredness to a soundly established right. It also yields a less profound support to merely conventional and expedient titles, adopted "to avoid strifes"; emphasizing at once the right obtained by the personal energy which enters into realized property, and the requirement that real effort should have entered in to give the clearest title. Jhering says with great force: "Only through a lasting connection with labor can property maintain itself fresh and healthy. Only at this source is it seen clearly and transparently, to the very bottom, to be what it is to man." Fraudulent practices of acquisition, within the lines of law, obscure the right of property; since in these cases is absent every vestige of its moral idea. "Communism thrives only in those quagmires in which the true idea of property is lost. At the source of the stream it is not to be found."[1] These thoughts are vital in relation to the "Social Problem"

[1] The Struggle for Law, Am. ed., pp. 49, 50.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

To the German way of looking at this whole topic, the characteristic procedure of the English mind, so long as it follows its native bent, offers a marked contrast. By the English mind the property problem is objectively viewed, from the standpoint of utilitarian ethics or in connection with the generalizations of political economy.

Bentham and J. S. Mill represent adequately the scope of English utilitarian ethics and the political philosophy founded upon these views. Bentham, whose life was devoted to the reform of law, could not fail to perceive clearly the intellectual character of property — a mere "foundation of expectation," which expectation can only be the work of the law. There is, therefore, he argues, no natural property; property is entirely the creation of law. The law, however, is not arbitrary and supported by force or fear as in Hobbes' theory. Its institutions, and notably that of property, prove to be attended with a thousand advantages.

> The laws [he says] in creating property have been benefactors to those who remain in their original poverty. They participate more or less in the pleasures, advantages, and resources of civilized society; their industry and labor place them among the candidates for fortune; they enjoy the pleasures of acquisition; hope mingles with their labors.[1]

There are enough other lucid and impressive passages in the same vein to make a readable and effective tract for the levellers of to-day. The peculiar genius of Bentham is happily exercised in elucidating what is involved in the conception of *security*, which is "far more fundamental to happiness than equality." For this reason the distribution actually established should be maintained by the legislator; and no less are taxes which spare the rich to the prejudice of the poor "attacks upon security." The general strain of Bentham's deductions was thus conservative of private property, though it has been said that while Bentham enunciates the principle of the greatest good of the greatest number, he seems to neglect the individual. The principle of "greatest happiness" is apt to appear, to privileged minorities, pregnant with revolution, since the calcu-

[1] Principles of the Civil Code, I, 8.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

lation is difficult to make and most liable to be disturbed by interests and sympathies. If utility be the ground of legislation, and a majority of needy persons acquire in any country political power, it would be difficult, it will be thought, to enable them so intelligently and profoundly to conceive and apprehend their happiness as Mr. Bentham does. Sir Henry Maine, in his *Popular Government*, remarks that Bentham overestimated human intelligence. "He wrongly supposed that all the truths which he saw clearly cut and distinct in the dry light of his intellect, could be seen by all men, or by many of them." It is certainly much easier for the average man to feel directly the moral force of the claim of right one makes to what he has himself saved or labored for, than to deduce the rule of property from the probable general consequences of its violation. Yet the utilitarian argument is of great value to social order; and when Mr. J. S. Mill amends Bentham's scheme, by recognizing differences of quality in pleasures, distinct from and overriding differences of quantity, the line of distinction between ideal morality and the utilitarian standard is no longer sharply drawn.

Mr. Mill in his investigations of property failed to maintain the optimistic view of the existing distribution of wealth characteristic of a true Benthamite. He had felt the influence of the social philosophy of Comte, and had been led to doubt the absolute conclusiveness of some of the deductions of the accepted political economy.

The direct effect of the doctrines of the English school of political economy was to justify, from a utilitarian point of view, the institution of private property as legally established. But while the modern economic and legal system was clearly justified from the point of view of production of wealth, it began to be apparent in the present century that in respect of distribution its results in human happiness left very much to be desired. The attempts to meet in part this difficulty by the Malthusian and Ricardian theories (which also generated at last the conception of the survival of the fittest as an evolutionary social end) aided to arm the criticism which had gathered force

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

under the name of "scientific socialism." Views which had been put forward to show the necessity of existing arrangements (*e.g.*, the so-called "iron law of wages") were held up to prove in turn their viciousness and the need of an economic reconstruction. Misleading deductions were also made from the Ricardian doctrine that labor is the only productive agent.

The speculations concerning property in a state of nature, which great thinkers have expended such pains in elaborating, though not wholly divested of logical significance, have been rendered obsolete by the researches into the history of early institutions, which have been pursued by Sir Henry Maine and others in recent years. The development of the historical school in jurisprudence has also discouraged all the explanations, once so favored, which partook of immediatism, and were marked by confidence in the power of convention and legislation to produce social institutions. The present laws of property have not been of mushroom growth.

The conception of progress from the lower to the higher, from simple to complex forms, — in a word, the doctrine of evolution, enters of late into most conceptions of the past and future of property, as of other social institutions. Thus the relativity of property rights is clearly apprehended. Human nature changes in the direction of higher capacity; its environment also changes; and with these change correspondingly the relations of fitness to conditions which are recognized in just laws.

The doctrine of evolution is, however, invoked in opposite directions, as the basis of their expectations or hopes, by extreme individualism on the one hand, and on the other by scientific socialism. The former school, if it may be called such, sees the only prospect of a noble human race in the strict maintenance by the state of the non-interference policy, with unchecked play for individualism in competition; the result of which, it is alleged (though far from shown), would be attainment through selection of the fit, of a race capable of the highest enjoyment and virtue.

In the view of evolutionary socialists, the present organization

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of property and arrangement for distribution by competition was good for its time, but is bound in the order of progress to disappear. In the natural course of things that which Fichte prophesied, socialists of this sort hold, is coming to pass: "Property will lose its exclusively private character and become a social institution." Of the mode of evolution of higher forms of property which is to take place according to "scientific socialism," it is the less needful to speak here, as an elaborate exposition of these views appears in another article in the present number of the QUARTERLY. The chief present significance of socialism appears to be that of a criticism upon the anti-social effects of extreme individualism in conceptions of property right, and that of a finger-post pointing toward the advantages to be obtained by profit-sharing or some form of co-operative industry or even by extension, within certain not wide limits, of the economic functions which the American state discharges. Its protests against certain wastes and burdens of the modern industrial system must be felt as impressive; but the reconstruction it proposes appears utopian while men and their motives remain as now. Indeed it seems necessarily to involve a subordination of individualities which means a reactionary movement of society, a "disguised return to feudalism." And from the highest conception of man's welfare this is too great a sacrifice to make even for ease. Of economic it may be said as Montesquieu said of political freedom: "Whatever be the price of this glorious liberty, we must be content to pay it to heaven."

This brief review of theories seems to warrant the general deduction that a complete discussion of property rights can be conducted only by combining the points of view given by the study of man's personality with its implications, the circle of observed and reasoned utilities, and the historic development of property institutions as indicating something of the normal course of progress in the future. And the combined work of a series of thinkers converges from different lines toward clear elucidation of the basis of property in general, and just conception and definition of particular rights.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

To conclude with some concise suggestions in addition to or development of points brought out in the foregoing discussion:

(1) Private property, rightly based, defined, and limited, appears in such sense a natural right that it appeals for support to the universal element in human nature. The titles by occupation and labor are most clearly justified by the necessity of occupation as the condition of labor, the right of which to its produce is evident both to intuition and from utility; and this necessity of occupation is as apparent as regards the soil as it is in regard to other material conditions of labor. The arguments by which philosophers have endeavored to ground the title by *succession* upon natural right or universal usefulness have been less conclusive.

(2) The feeling of property right, the respect for property, is of course strengthened by whatever in property laws and usages keeps it in vital connection with its rational and moral grounds, and is weakened in proportion to the lack of such vital connection. The respect for property is greater to-day because the right is more rationally defined and exercised. If held and used in the spirit of the barbarian captor, with arbitrary will and assertion of the ancient claim to "use or abuse," the effect is that which Bentham might describe as "weakening security." The obligations of property also increase as wealth is increasingly due to the co-operation of the social forces, and this is properly recognized in legislative adjustment of the social burdens as well as in the use private individuals make of their own.

Our philosophy of human nature will necessarily influence our conception of human rights and obligations with regard to property. A just view of man's nature grounds his right in rational and moral capacity; as a materialistic view tends to a hard and narrow egoism. Because man is a person, he is capable of the property trust; and this suggests that artificial or juristic persons are not equally capable of this right, without such restrictions or qualifications as may tend to prevent its being exercised in a merely wholesale and mechanical way.

Materialistic conceptions of man's nature and requirements

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tend moreover to foster the impossible claims of communism. So long as man is looked at mainly from the side of his external life and its requirements, the demands which arise are beyond any power of social arrangement to satisfy. But the good of life which all can share is better than riches and not affected by competition. Indeed, from the point of view of the requirements of mind and character, anything like equality of external conditions might seem undesirable even if attainable. For, while individualism in economic affairs may be further qualified in the interest of both production and distribution of wealth, private property and inequality of fortune appear to be permanent conditions for the highest development of personality.

GEORGE B. NEWCOMB.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

VON HOLST'S PUBLIC LAW OF THE UNITED STATES.[1]

THERE is nothing which more excites the admiration of a true scholar than the courage and zeal with which the great German *savants* undertake the most gigantic tasks in science and letters, as there is nothing more satisfactory than the manner and success with which they master and complete them. Dr. Heinrich Marquardsen, professor in Erlangen, and member of the imperial parliament and of the Bavarian chamber of deputies, has recently placed the jurists and political scientists of the whole world under obligations to him through his assumption of the direction of one of these immense enterprises. Assisted by forty-two of the most capable publicists of Germany, France, Austria, Switzerland, Belgium, Denmark, and Norway, he has undertaken to make the public law of the civilized world accessible. The title of the work is *Handbuch des Oeffentlichen Rechts*. It is to consist of four stout volumes, each divided into half-volumes, and each of these into a number of parts. Three volumes, and four parts of the first half of the fourth have already appeared. The first volume sets forth the general principles of public law and political science. The second gives the public law of the German empire, of Alsace-Lorraine, and of Prussia and Saxony. The third deals with the rest of the states of the German empire. The fourth is to embrace the rest of Europe, and North and South America.[2]

[1] Handbuch des Oeffentlichen Rechts der Gegenwart, in Monographien. Herausgegeben von Dr. Heinrich Marquardsen. — Vierter Band, erster Halbband, dritte Abtheilung: Das Staatsrecht der Vereinigten Staaten von Amerika. Bearbeitet von Dr. von Holst. Freiburg i. B. 1885. — Lex. 8vo, vii, 189 pp.

[2] A full list of titles and authors shows more clearly than any *résumé* the extraordinary range of this great work, and its value.

I. BAND. (Allgemeiner Theil.)

I. *Halbband.*	II. *Halbband.*
Marquardsen, Einleitung.	Sarwey, Allgemeines Verwaltungsrecht.
Gareis, Allgemeines Staatsrecht.	Bulmerincq, Völkerrecht.
Hinschius, Staat und Kirche.	Marquardsen, Politik.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

It is not my purpose to attempt a review of the entire work in this paper. A year's study and a volume, at least, would be necessary for this; but I do not hesitate to affirm, even from a limited examination, that this vast production is, in my opinion, the most important contribution which this century has made to the study of public law and political science. It is somewhere related that when Professor Agassiz first heard the venerable President Hitchcock, of Amherst College, expound

II. BAND. (Staatsrecht des deutschen Reichs und der deutschen Einzelstaaten.)

I. *Halbband.*

Laband, Deutsches Reich.
Leoni, Elsass-Lothringen.

II. *Halbband.*

Schulze, Preussen.
Leuthold, Sachsen.

III. BAND. (Fortsetzung des Staatsrechts der deutschen Einzelstaaten.)

I. *Halbband.*

Vogel, Bayern.
Gaupp, Württemberg.
Schenkel, Baden.
Gareis, Hessen.

II. *Halbband.*

Büsing, Mecklenburg-Schwerin und Strelitz.
Becker, Oldenburg.
Otto, Braunschweig.
Pietscher, Anhalt.
Böttcher, Waldeck.
Bömers, Schaumburg-Lippe.
Falkmann, Lippe.
Meyer, Sachsen-Weimar-Eisenach.
Kircher, Sachsen-Meiningen.
Sonnenkalb, Sachsen-Altenburg.
Forkel, Sachsen-Coburg und Gotha.
Klinghammer, Schwarzburg-Rudolstadt.
Schambach, Schwarzburg-Sondershausen.
Liebmann, Reuss ältere Linie.
Müller, Reuss jüngere Linie.
Molffson, Hamburg.
Klügmann, Lübeck.
Sievers, Bremen.

IV. BAND. (Staatsrecht der ausserdeutschen Staaten.)

I. *Halbband.*

Ulbrich, Oesterreich-Ungarn.
Von Orelli, Schweiz.
Von Holst, Vereinigte Staaten von Amerika.
De Hartog, Niederlande.
*Nys, Belgien.
*Eyschen, Luxemburg.
*Lebon, Frankreich.
*Brusa, Italien.

II. *Halbband.*

*Engelmann, Russland.
*Aschehoug, Schweden und Norwegen.
*Goos, Dänemark.
*Marquardsen, Grossbritannien und Irland, britische Colonien.
*Saripolos, Griechenland.
*Manole u. A., Romänien, Serbien, Türkei.

The treatises starred (*) may be expected during the present year. The last half-volume will also treat of Spain and Portugal, Mexico, Brazil, and the other states of South America, and those of Central America. The time for the appearance of this (concluding) portion of the work is not yet fixed.

The "Handbook" is published at Freiburg, Baden, in the akademische Verlagsbuchhandlung von J. C. B. Mohr.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the geological formation of the Connecticut Valley, he said, "This is beautiful *description;* but true science is *comparison.*" This is true not only of natural science, but also of jurisprudence and political science; and as the method of Agassiz marked a new era in American geology, so will this great work of Marquardsen conduct the student into those rich fields of comparative study in public law and polity, from which a new and deeper view of these subjects must result.

Of course the topic of highest interest to the American student treated in this work is the public law of the United States; and it is Dr. von Holst's treatise on this topic that I propose to examine. It is a most valuable thing to study the civilization of one's own land and country from a foreign standpoint. One gets thereby a bird's-eye view of the course and relation of events and institutions and of social forces — a view which is almost unattainable while floating in the common current. And it is especially valuable when such a view can be had under the direction of one who can look beneath the surface, and guide attention not only to the *ensemble,* but also to the *forces profondes.* The author of this part of Marquardsen's vast work possesses these qualities in an eminent degree. A great historian and publicist, both by genius and training, he has devoted years of patient and careful study to our laws, customs, and institutions. He has dwelt among us, visiting our halls of legislation, our bureaux of administration, our courts, our universities, colleges, schools, churches, and charitable establishments. He has used the material which we have collected in our libraries, and he has had the advantage of personal contact with many of our most prominent men. He has had the near view and the distant view. He could both sympathize and criticise. No one could be better fitted than he to do the work which he has undertaken and so creditably accomplished.

It is true that there are some mistakes in the book, but they are mostly in the minor details; and I only wonder that there are not ten times as many. There is no state in the civilized world whose public law is so complicated as that of the United

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

States, save perhaps that of Germany. I do not believe that there is an American living who knows it in all its details. That a foreigner could write this book and fall into so few errors as Professor von Holst has done, is a marvel.

In the first place, the logical arrangement of the work is most admirable. The first twenty pages are devoted to the genesis of the Federal constitution; the next one hundred and twenty-one to the exposition of the Federal constitution; and the last forty of the text to the comparative constitutional law of the commonwealths. This last division is an entirely new contribution to the literature of our public jurisprudence. So far as I am aware, this subject has nowhere else, as yet, received any satisfactory treatment, save in the private lectures of a few professors. In these general divisions the author has followed the usual course. It is in the subdivisions, especially of the second part, that the newness and logical excellence of his arrangement appear. He classifies the provisions of the constitution and our fundamental statutes and customs under the categories of political science, thus bringing the scattered element of our public law into organic combination. This is a great aid to the student; and the author deserves and has our most grateful acknowledgment for this contribution to the science of method.

The general results to which he comes are, I think, indisputable. He denies that the constitution is in any sense a compact between states, and asserts it to be a real constitution; a fundamental and organic law, ordained by the people of the United States (page 25). He refuses to call the opening clause a preamble; he regards it as the most important provision of the instrument, as "the enacting clause" of the whole constitution (page 23); and he declares that the people through the constitution have conferred upon the organs of the general government the right and the duty of compelling obedience to the constitution and the laws, no matter how or from whom resistance to them may come (page 26). He does not, of course, regard the United States at the present stage of development as a purely national, consolidated system. Not only is the govern-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mental system dual, but the people of the United States is a body acting through a distinct organization in each commonwealth (pages 27, 28); and the author does not prophesy the transformation of this system in the immediate future, though he remarks in many places the steady nationalization of our interests and ideas. In respect to the distribution of powers and functions through our entire system, he has discerned rightly, in the main, the tendencies which our history is revealing. He remarks the continual expansion of the powers of the central government, especially of the Congress; the increasing restrictions upon the legislation of the commonwealths; and the growing autonomy of the municipalities.

The method, the spirit, and the general conclusions of the whole work are so excellent, so stimulating, and so accurate that I hesitate to mar the general effect upon the mind of the reader by calling attention to some minor errors and defects which the demands of scientific criticism will not allow to be ignored.

In my review of these points I will simply follow, as to order, the paging of the book. At the bottom of page 14, speaking of the original ratification of the constitution of 1787 by conventions of the people in the several commonwealths, the author affirms:

> In case four or a less number of states refused ratification, they would thereby *legally* go out of the Union, until they were pleased to re-enter the same or until the other states perhaps forced them to re-enter under the pressure of an unavoidable necessity.[1]

This does not appear to me to be sound political science. The law and facts in reference to the ratification of the constitution were briefly as follows:

(1) *The law.* We were living under the Articles of Confederation of 1777. They were the supreme law of the land. They contained a provision for the making of all future changes in the organic law; which, of course, impliedly stamped all changes

[1] "Falls vier oder weniger Staaten die Ratifikation verweigerten, schieden sie also ipso facto rechtlich aus der Union aus, bis sie für gut fanden neu in dieselbe einzutreten oder die anderen Staaten sie vielleicht unter dem Druck einer unabweislichen Nothwendigkeit dazu zwangen."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

made in any other manner as extra-constitutional and illegal. That provision (article xiii.) ordained:

> And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

The strictly *legal* effect then of the rejection of the plan of the Convention of 1787 by any state would have been the defeat of the plan and the maintenance of the Union of all the states under the existing articles; and if, nevertheless, those ratifying the plan chose to put it into operation over themselves, *they* must be regarded as having withdrawn from the Union in violation of law and plighted loyalty.

(2) *The facts.* The system established by the Articles of Confederation had proved a failure. Under it we were drifting surely and rapidly into helplessness and anarchy. Repeated attempts were made to strengthen the system by amending the articles in the regular and legal way provided. They all failed because of the inflexibility of the method. Certain of the more far-sighted statesmen of the day began to feel that, judged from the standpoint of our history and the actual relation of our political society, the Confederate system, in its law of amendment as well as every other provision, had been from the beginning a misinterpretation. Governor Bowdoin of Massachusetts spoke it out boldly in his message of May 31, 1785, to the legislature, and secured from that body instructions to the delegates of Massachusetts in the Confederate Congress to move, in this assembly, the summoning of a convention of the people of the whole confederacy to revise the constitution; but these delegates were so frightened at the revolutionary character of the proposition that they disobeyed the command of the legislature which sent and instructed them, and never presented the project at all.[1] On the other hand, the more politic Hamilton, supported by Madison, took advantage of the occasion offered

[1] Curtis, History of the Constitution, vol. i., pp. 336 ff.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

by the commercial convention at Annapolis in the autumn of 1786 to so expand the subjects under consideration as to make it appear evident that the whole Confederate constitution was involved in the solution of the commercial question, and that therefore a new convention, composed of delegates from all the states, ought to be assembled for the purpose of suggesting such changes in the constitution as would make the system adequate to the needs of the Union. They succeeded in bringing the Confederate Congress to the point of issuing the call for such a convention, directing that its sole and express purpose should be the revision of the Articles of Confederation; that it should report the same to the Congress and the state legislatures; and that its suggestions should become parts of the constitution when agreed to in Congress and confirmed by the states.[1] When, however, this Convention met in May of 1787, it was found that one state (Rhode Island) had sent no representatives. This was tantamount to a notification that Rhode Island would not ratify any changes which the Convention might propose looking to a consolidation of the Union; and if she would not, then legally the work of the Convention would be useless. The Convention was thus forced from the outset to propose some other method of ratification than that contained in the Confederate constitution. But that was the only legal method. Anything else was extra-legal, unconstitutional, revolutionary. There was certainly no power in the Convention to change the clause of amendment of the Confederate constitution any more than any other provision of that instrument. The exact legal position of the Convention was that of an advisory body to the Confederate Congress. It was in no sense a sovereign body. It could only resolve to propose; and such a resolution could not place the stamp of legality upon anything.

Nevertheless it coolly declared: "The ratification of the conventions of *nine* states shall be sufficient for the establishment of this constitution between the states so ratifying the same."[2] If the Convention had submitted this provision separately and

[1] Journal of the Confederate Congress, February 21, 1787.
[2] Constitution of the U. S., Art. vii.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

antecedent to the other parts of their draft to the Congress, and the Congress had approved and referred the same to the state legislatures, and these had unanimously ratified it, then it would have been legal and regular to have applied the new method of amendment and revision to the other parts of the plan; but such was not the procedure. The Convention knew well enough that this could not be accomplished. It therefore wrote this provision at the very end of the draft, and sent it as a part of the same to the Congress. It was certainly a shrewd move; and the proposed method of action undoubtedly corresponded much more nearly to the natural conditions and relations of our political society than did the provision of the Confederate constitution applicable to the case; but from a strictly legal standpoint it was a revolutionary proposition on the part of the Convention, and the reception and approval of this proposition by the people was a revolutionary act on their part. As tersely as I can express it, what happened was this: The natural leaders in the nation invoked a force unknown to the constitution to assert itself as the sovereign power, and at the same time to declare the form of organization under which it would act and the majority sufficient to give validity to the act; and the regularly constituted powers felt compelled to stand aside and see this new self-constituted sovereignty occupy the ground. They actually put the new system into operation while two of the states were still holding out against its adoption, and assumed such an attitude towards these as to make them quickly feel that further resistance would be disastrous. It seems to me, then, that an exact political science would lead us to abandon any attempt to find a *legal* justification for the manner in which the constitution of 1787 was established. We should accept fairly and fully the proposition that the constitution of 1787 rested originally upon a revolutionary basis, and justify the fact upon the principle of public necessity. But this proposition has at least one very important corollary and teaches at least one very important lesson. If the creation of the present constitution was a revolutionary act, justified on natural and moral grounds, then the method of procedure and the effect

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the act should be such as political science would dictate. Now political science would pronounce that, in a naturally popular political society, the undoubted majority should act for the whole in the original establishment of an organic law, and that the attribution of a power to such a majority to *destroy* a previous system of organization for the whole, without the corresponding power to *construct* a new system for the whole, is state suicide. This is the corollary. The lesson is that, in constructing provisions for amending a constitution, the original sovereign should never dethrone himself, nor depart too far from the method of action originally followed, if legal continuity in political growth is to be preserved. This leads me directly to notice a dictum of the author, upon this very subject, which appears to me very doubtful, to say the least. On page 19 he writes:

> Experience has accordingly shown that the provisions of the constitution in reference to amendment sufficiently permit the imperative demands of the developing relations to be met and disposed of satisfactorily [*etc.*].[1]

The great and significant value of a method of constitutional amendment is its capacity to prevent recourse to violence in the solution of the great questions of internal politics. If it does not do this in any degree, it has no value at all. We know that the amending power in our constitution has not preserved us from civil war in the past. We know that for sixty years it did not do one single thing to clear away the mass of error with which our public law was becoming more and more encrusted. We know that while natural conditions were working more and more towards national consolidation, the interpretation of our political system was pointing more and more towards confederation and anarchy, and that in spite of our growth in national unity not one single power has ever been conferred upon the national government by the process of amendment,

[1] "Die Erfahrung hat mithin gezeigt, dass die Bestimmungen der Konstitution über Verfassungsänderungen auf der einen Seite es in hinlänglicher Weise ermöglichen, gebieterischen Anforderungen der sich entwickelnden Verhältnisse gerecht zu werden," *etc.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

except after, and as the result of, successful war. Whether a more facile method would have saved us from the appeal to arms may well be doubted. Whether the present form will serve us better in the future than it has in the past is unknown. Of one thing I feel sure, however, that the author's declaration that it has been and is a satisfactory solution of the question is an assumption.

On page 31, in treating of the power of Congress to make all laws necessary and proper for executing the powers vested in the government of the United States, the author writes:

> Whether [such laws] are proper, Congress alone shall judge; it is not a legal but a political question.[1]

This appears to me a little extravagant. I believe all American jurists would agree that the case which concedes to Congress the widest powers under this provision is that of Juilliard *vs.* Greenman.[2] Justice Gray's words upon the subject are as follows:

> By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.[3]

That is, the court shall determine the general sphere of the appropriate, and the Congress may exercise the choice of means within that sphere. If this be not the meaning of the dictum, then the proper course for the court to pursue would have been to decline jurisdiction; but it did not do so. It proceeded to determine upon the appropriateness of the Congressional act in these words:

> We are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal

[1] "Ob sie geeignet sind untersteht allein seinem Urtheil; es ist nicht eine Rechtsfrage, sondern eine politische Frage."

[2] 110 U. S. Reports, p. 421.

[3] *Ibid.*, p. 440.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress [*etc.*] . . . It follows that the act . . . is constitutional and valid.[1]

That is, the court determines the appropriateness, and the Congress may select any one of several means, all appropriate, which appears to it the most advantageous.[2]

On page 42, in considering the effect of the fifteenth amendment upon the extension of the suffrage, the author affirms :

Contrary to a widely received view, the courts have decided in all direct cases that no one has received the suffrage through this amendment.[3]

Doubtless the author obtained this idea from the case of the United States *vs.* Reese.[4] But subsequent to that case, and yet several years previous to the appearance of the work we are now reviewing, the court, in two direct and noted cases,[5] qualified its previous utterances. In *Ex parte* Yarbrough the court said :

While it is quite true, as was said by this court in United States *vs.* Reese, that this Article [the fifteenth amendment] gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons.

[1] 110 U. S. Reports, p. 450.

[2] The author repeats his view upon this subject on page 36, in terms which indicate that we have to do not with a simple infelicity of expression, but with a deliberate opinion. He says: "So z. B. hat nicht das Gericht, sondern lediglich der Kongress darüber zu befinden, ob die von ihm zur Ausübung einer verfassungsmässigen Befugniss erwählten Mittel 'nothig und geeignet' sind."

[3] "Im Gegensatz zu einer weit verbreiteten Ansicht ist von den Gerichten in allen einschlägigen Fällen entschieden worden, das Niemand durch dieses Amendement das Stimmrecht erhalten hat."

[4] 92 U. S. Reports, 214.

[5] Neal *vs.* Delaware, 103 U. S. Reports, 370; *Ex parte* Yarbrough, 110 U. S. Reports, 651.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women.

In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer upon the negro the right to vote, and Congress has the power to protect and enforce this right.[1]

Evidently the proposition of the author upon this subject can be received only after very important modification.

On page 52 the author discusses the question of the presence of the cabinet officers in the legislative (Congress), and expresses the following opinion :

But the Congress knows too well how greatly the position of the executive over against itself would become strengthened should the secretaries be allowed to appear and speak in the Senate and House, and its tendency to elevate its own dignity and expand its own powers at the cost of the executive is too pronounced, for those who regard such a change of practice as one of the most urgent and important reforms to hope for any speedy realization of their view.[2]

If I understand the author, he means to teach that, according to his own political science, the effect of giving the secretaries the right to appear and speak in Congress would be to strengthen the executive. This appears to me, to say the least, very dubious. The facts of history seem to me to be all on the other side, even when the ministers have seat and vote and power to dissolve as well as voice in the legislative chambers; and certainly the author's theory is not generally held by the jurists and statesmen of Europe. The recent conflict in Norway between the king and the parliament turned on this very question; and the crown lawyers all held that voice, without seat and vote and right to dissolve, would lead to the subordina-

[1] *Ex parte* Yarbrough, 110 U. S. Reports, 665.

[2] "Allein der Kongress ist sich zu gut dessen bewusst, wie sehr die Stellung der Executive ihm gegenüber dadurch gekräftigt werden würde, dass die Secretäre im Senat und Representantenhause das Recht des Wortes erhielten, und seine Tendenz geht zu entschieden dahin, auf Kosten der Executive das eigene Ansehen zu erhöhen und die eigene Machtsphäre zu erweitern, als dass diejenigen, die in dieser Aenderung eine der dringlichsten und bedeutsamsten Reformen erblicken, hoffen dürften, bald mit ihrer Ansicht durchzudringen."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion of the ministers, and therefore of the executive, to the legislature. If the author had only written that the members of Congress *think* they know, in place of "the Congress knows too well," then I could have passed over this paragraph without a word of criticism or dissent.

On page 66, in treating of the limitation upon the tax-power of Congress, we find the following sentence:

> Congress cannot tax state property, *such as a railway*, nor the salaries of state officers, nor municipalities and their property, *etc.*[1]

Is it possible that the author thinks that we have railways belonging to the states, and that the constitution or the court has denied to Congress the power to tax them; or is this simply a fancied example of his own? If the former, we should like to know the sources of his information. He cites McCullough *vs.* Maryland (4 Wheaton, 316), Veazie Bank *vs.* Fenno (8 Wallace, 533), and the Collector *vs.* Day (11 Wallace, 113), in support of the entire proposition — and, I suppose, of the particular part of his proposition which is here traversed — but there is not a word in any one of these cases for him to rest upon. It is true the court has said that the necessary agencies for legitimate purposes of state government are not proper subjects of the taxing power of Congress;[2] but it has never said that a railway is such an agency, and it has always shown the disposition to give as narrow a definition as possible to the phrase, necessary agencies or instrumentalities of government. In one of these very cases the court said:

> A railroad company, in the exercise of its corporate franchise, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad.[3]

[1] "Von dem Kongress dürfen nicht besteuert werden: staatliches Eigenthum wie eine Eisenbahn, Gehalte der Staatsbeamteten, Munizipalitäten und ihr Eigenthum, u. s. w."

[2] Collector *vs.* Day, 11 Wallace, 113.

[3] Veazie Bank *vs.* Fenno, 8 Wallace, 533, 547.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

It is true that this is not exactly saying that a railway owned by the state, and not simply chartered by it, is subject to the tax-power of Congress; but it indicates that, if it indicates anything in regard to the subject. It is no more contemplated, in our system, that a state may withdraw railroads from the tax-power of Congress by becoming the owner of them, than that it may defeat an excise upon tobacco and whiskey by making them state monopolies, or prevent the collection of customs by doing the importing trade for its citizens itself. I have no doubt we shall ere long be called upon to contemplate questions relating to a more extended state ownership of property; but the matter belongs with us as yet in the domain of political economy, while our author has professedly written a law book. If, however, this example be but a matter of personal fancy, then we must say that the illustration is badly chosen, is misleading, and should be discarded.

The treatment of the subject of foreign commerce and of commerce between the states, is to my mind the most unsatisfactory part of the book. It is true that these subjects have not been elucidated at every point by decisions of the courts, and that the reconciliation of all the decisions is not without some difficulty; but I do not think that the confusion is at all so great as the author represents. For instance, on page 78, he says:

> The Supreme Court has decided, in the license cases (5 Howard, 504), that the states may, under certain presuppositions, require a license for trade in imported liquors or in liquors transported from another state, while the older case of Brown *vs.* Maryland (12 Wheaton, 419) had decided that, in general, the rights of importers to sell could not be impaired by the states through the demand that the vendors should procure a license.[1]

[1] "Ferner hat das Oberbundesgericht in den License Cases (Howard V., 504) entschieden, dass die Staaten den Handel mit importirten oder aus einem anderen Staate eingeführten Spirituosen unter gewissen Voraussetzungen an die Bedingung des Besitzes eines Berechtigungsscheines (license) knüpfen dürften, während es in dem älteren Falle Brown *v.* Maryland (Wheaton XII., 419) entschieden hatte, dass im Allgemeinen die Verkaufsberechtigung der Importeure nicht von den Staaten durch die Forderung der Lösung eines Berechtigungsscheines beeinträchtigt werden dürfe."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The point decided in the older case was, as every well-informed jurist in the United States knows, that a state law, requiring an importer to take out a license before he be permitted to sell a *package* of imported goods, is in conflict with that provision of the constitution of the United States which declares that "no state shall lay any impost or duty on imports," *etc.*, and also with the clause which declares that Congress shall have power "to regulate commerce," *etc.* In this very case the court says: "This state of things is changed if he [the importer] sells them, or otherwise mixes them with the general property of the State, by breaking up his packages," *etc.*[1] In short, Brown *vs.* Maryland protects the unbroken package imported from a foreign country in the hands of the importer. The license cases did not touch this point except by way of *obita dicta*, and in every case to affirm the principle of the earlier decision. Two of these cases had reference to a license tax upon articles in the retail, or after they had left the hands of the importer; and the other to domestic traffic between the states. I do not therefore see the contradiction which the author indicates between the decisions. If he had consulted the later cases of Welton *vs.* Missouri,[2] and Henderson *vs.* Mayor of New York,[3] neither of which I find anywhere referred to in his work, it appears to me that he would have treated this whole subject with more clearness and intelligence; but even with the light which he confesses to have had, I cannot help feeling that he has made the matter unnecessarily difficult to himself and to his readers.

On page 83, I find the following statement:

> Copyrights and patents, according to the existing laws, are granted to citizens and inhabitants of the United States for 28 years. . . .[4]

Section 4884 of the Revised Statutes of the United States fixes the term of a patent at seventeen years; and I have in vain searched the statutes at large, passed subsequent to the adop-

[1] Brown *vs.* Maryland, 12 Wheaton, 419, 443.

[2] 91 U. S. Reports, 275.

[3] 92 U. S. Reports, 259.

[4] "Verlagsrechte und Patente werden nach den bestehenden Gesetzen Bürgern und Einwohnern der Vereinigten Staaten auf 28 Jahre ertheilt. . . ."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion of the Revised Statutes for any revision of this subject. It is possible that this error may be only a slip of the pen.

At the bottom of the same page (83) the author writes in regard to the power of Congress to punish piracy:

> Since piracy is a concept of international law, Congress is not obliged to define it; but whatever is piracy, in international law, falls under the penalties affixed by Congress to that crime. Nevertheless, Congress has the power to declare crimes piracy which are not so in international law, and to punish them as such.[1]

The latter sentence can stand only under a very important limitation, which has here been omitted; *viz.*, when the person convicted of such a crime is subject to the jurisdiction of the United States. The very case which the author cites in support of his doctrine, *viz.* The Antelope, declares:

> If it [the slave-trade] is consistent with the law of nations, it cannot in itself be piracy. It can only be made so by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.[2]

I cannot believe that the author was not aware of this limitation. It is too much a principle of natural reason for that. I put it down simply as an oversight in rapid and terse composition.

On page 96, in considering the question of the power of Congress to govern the territories, the author writes:

> The opinion of the Supreme Court of the United States that this authority is to be found in the war and treaty-making power was universally approved.[3]

He then proceeds to raise the question, whether under such an interpretation Congress has any power at all to govern such

[1] "Da der Seeraub ein völkerrechtlicher Begriff ist, ist der Kongress nicht zur Definirung desselben verpflichtet, sondern was nach dem Völkerrecht Seeraub ist, verfällt auch der von ihm für denselben festgesetzten Strafe. Wohl aber ist er berechtigt, auch Verbrechen, die völkerrechtlich nicht Seeraub sind, für Seeraub zu erklären und als solchen zu bestrafen."

[2] The Antelope, 10 Wheaton, 66, 122.

[3] "Die Ansicht des Oberbundesgerichts, dass es in dem Kriegs- und Vertragsrecht gegeben sei, hat denn freilich allgemeine Zustimmung erfahren."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

territory as was not acquired through treaty. The first great case upon which we rest for the authoritative exposition of this subject is the American Insurance Company *vs.* Canter,[1] where the court declared that Florida, which was acquired by treaty with Spain, was a territory of the United States,

governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

The court then added:

> Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.[2]

It is evident here that the court declares the opposite view from that attributed to it by the author, though it admits that there may be a question. The case of Dred Scott *vs.* Sandford[3] takes the ground that the clause to make all needful rules and regulations, *etc.*, "applies only to the particular territory of which we have spoken," — *viz.*, that within the limits of the United States at the time of the formation of the constitution and which had been or then was claimed by a state, — "and cannot, by any just rule of interpretation, be extended to territory which the new government might afterwards obtain from a foreign nation." The court in this case declares[4] that the power to govern *such* territory is "the inevitable consequence of the right to acquire territory"; and labors hard to show that this view is in harmony with that expressed in the American Insurance Company *vs.* Canter. Finally, in the *post bellum* case of the National Bank *vs.* County of Yankton, the court declares:

> It is certainly now too late to doubt the power of Congress to govern the territories. There have been some differences of opinion as to the

[1] 1 Peters, 511.
[2] *Ibid.*, p. 542.
[3] 19 Howard, 393.
[4] *Ibid.*, pp. 442, 443.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

particular clause of the constitution from which the power is derived, but that it exists has always been conceded.[1]

I cannot see under these decisions what practical difficulty could ever arise or could ever have arisen in regard to the question. All the territory that we have, and all that we ever had, or could have had, or can have, must fall under one or the other of two divisions; *viz.*, what we had when the constitution was adopted, and what we have acquired since or may acquire; and these decisions certainly provide for all the exigencies of both cases under any view which the court has ever taken of the question. It would indeed be a great triumph in juristic scholarship for a foreign commentator upon our constitution to convict the supreme interpreting organ in our system of erroneous or faulty construction. I can easily comprehend, too, that the desire to win such a victory might tempt the mind of the fairest critic to some exaggeration of the imperfections of his subject. I hope I should be one of the last to detract in the least from the former or to make too much of the latter; but I cannot help feeling that in this matter our learned author has found a mare's nest in place of a mine of truth.

On page 101, in treating of the admission of new states, the clause of the constitution (article 4, section 3, paragraph 1) which reads:

> But no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress

is translated into the German language as follows:

> Aber kein neuer Staat soll innerhalb des Jurisdiktionsgebietes eines anderen Staates gebildet oder errichtet werden;[1] noch soll ohne die Zustimmung der Legislaturen der betreffenden Staaten sowie des Kongresses durch die Vereinigung von zwei oder mehr Staaten oder Theilen von Staaten ein Staat gebildet werden.

The numeral ([1]) refers to a footnote, which reads:

> [1] 101 U. S. Reports, 129, 132.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Der Kongress hat sich jedoch für befugt gehalten nach der Sezession von Virginia den loyal gesinnten Theil des Staates zu autorisiren, unter dem Namen von West Virginia sich als eigenen Staat zu konstituiren.

The Congress nevertheless considered itself empowered, after the secession of Virginia, to authorize the loyal part of the state to constitute itself as a separate state under the name of West Virginia.

It is plain, from the juxtaposition of the words in the author's translation and the language of the note, that he thinks the constitution places an *absolute* prohibition upon the formation of any new state within the jurisdiction of any other state, and that the conditional words at the close of the provision apply only to the cases when the new state is formed by the union of two states or parts of two states. This is a new idea to me, and I cannot imagine where the author could have found it. He certainly must have read the enabling act of Congress,[1] erecting the western counties of Virginia into the state of West Virginia; he must have observed that Congress there recites with all particularity, as the basis of its own act, the consent and request both of the convention which framed the new state constitution and of the legislature of the State of Virginia; and he ought to know, if he does not, that there is a Supreme Court decision[2] which treats this act of the Congress as entirely regular and legal, and confirms, upon the basis of it, the jurisdiction of the new state over two counties concerning which a controversy existed between it and Virginia. Is it possible that he means to teach that the loyal legislature of Virginia, — recognized by Congress and the President as *the* legislature of that state, — which gave its consent to the formation of the new state, was not the real legislature of Virginia? I cannot attribute such a view to him. I do not believe that he entertains it. He is too sound a political scientist for that. I must leave it to him to explain this extraordinary view himself in the later edition of his work.

On page 102 the author comes upon the very important question as to the power of Congress to lay down conditions in the

[1] Act of Dec. 31, 1862. U. S. Statutes at Large, vol. xii., pp. 633, 634.

[2] Virginia *vs.* West Virginia, 11 Wallace, 39.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

enabling acts admitting new states. He declares that the fundamental principle of the constitution, in this respect, is absolute equality between the states; and therefore, if the Congress in these acts undertakes to impose upon the states admitted under them conditions which do not rest upon the original states, such conditions are not *constitutionally* binding upon the state after admission; they are only compacts which the state is *morally* bound to observe. He admits, of course, that Congress has imposed such conditions, and explains the fact as follows:

> Congress would hardly have demanded the conclusion of such compacts, and, if it had, its action would been universally disapproved, except for the fact that the slavery question and later the civil war and the abolition of slavery created such relations that legal scruples were necessarily thrust into the background by political and moral considerations.[1]

This is undoubtedly the *ante bellum* state sovereignty view of the subject; but if such acts on the part of Congress are *now* considered as contrary to the spirit of the constitution, how does the author explain the fact that after the abolition of slavery and the cessation of war, and in regard to quite other subjects, Congress still continues to impose these extra-constitutional conditions? The enabling acts in the cases of Nevada,[2] Nebraska,[3] and Colorado,[4] contain provisions which decree religious toleration, and forbid discrimination against citizens of the United States residing out of these states in the taxation of land, and require of the conventions framing the constitutions of these states ordinances pledging the irrevocability of these conditions except by consent of the United States. The original states had perfectly free hand in reference to these subjects.

[1] "Der Kongress würde auch schwerlich ihren [*sc.* derartiger Pakten] Abschluss gefordert haben, und hätte er es gethan, so wäre es allgemein missbilligt worden, wenn nicht die Sklavenfrage und später der Bürgerkrieg und die Aufhebung der Sklaverei Verhältnisse geschaffen hätten, in denen die rechtlichen Bedenken durch die politischen und sittlichen Erwägungen in den Hintergrund gedrängt wurden und werden mussten."

[2] Act of March 21, 1864. U. S. Statutes at Large, vol. xiii., p. 30.

[3] Act of April 19, 1864. U. S. Statutes at Large, vol. xiii., p. 47.

[4] Act of March 3, 1875. U. S. Statutes, vol. xviii., part 3, p. 474.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Will the German commentator declare the Congress in error in these cases? The court has not done so, and until this happens the interpretation which the Congress puts upon its constitutional powers is authoritative. The only ground which we have to rest upon as yet in criticising the same is what political science furnishes. From such a standpoint it seems to me that the preservation of civil rights is a far more fundamental principle of our system and of any constitutional system than the preservation of equal autonomy to the states. In fact, the great argument in political science for state autonomy is that, generally, civil rights are better preserved under such a system than under a completely centralized system. If, however, that autonomy be exercised to suppress civil rights, the great purpose of its existence fails. We know that this has happened in our history, and that we have repeatedly invoked the deeper principle with which to combat it. It seems to me that it would be more scientific as well as more liberal-minded to acknowledge this power to Congress as a part of our constitutional practice, and to concede that the authority vested in Congress for maintaining republican institutions, preventing the abridgment of the privileges and immunities of citizens of the United States, and protecting life, liberty, and property against any undue process of law, cover it with constitutional legitimacy.

On page 127 the author quotes that part of article 4, section 4, of the constitution which provides that "the United States shall guarantee to every state in this Union a republican form of government," and says: "This is the only constitutional provision which imposes a duty upon the United States."[1] The author probably means that this is the only provision imposing an *express* duty; for the paragraph in which he makes this statement is headed "Express Obligations." But even with this limitation the statement is inaccurate. The remainder of the section declares that the United States shall protect each of the states against invasion and, upon application of the proper state

[1] "'Die Vereinigten Staaten sollen jedem Staat in dieser Union eine republikanische Regierungsform garantiren' (Art. IV., Sekt. IV.). Das ist die einzige Verfassungsbestimmung die den Vereinigten Staaten eine Pflicht auferlegt."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

authority, against domestic violence. Here certainly are other duties expressly imposed.

Moreover, according to my understanding of the constitution, there are many duties impliedly imposed upon the United States which the author nowhere remarks. Take, for instance, the thirteenth amendment, prohibiting slavery and empowering the Congress to enforce this article by appropriate legislation. Will the author claim that this imposes no duty upon the Congress to enact such laws as will carry out this provision? If this be so, then the law-making power can defeat the commands of the constitution-making power by failing to enact the measures necessary for its execution. The author does not sufficiently distinguish between that part of the constitution which merely enumerates the subjects upon which Congress shall have power to legislate, and that part which enacts the law itself and leaves to Congress only the work of elaborating the measures for its execution. As to the latter, I contend that the duty is imposed upon the Congress to do this faithfully and conscientiously, and that it has no discretion as to whether it will or will not do so; and that, if nevertheless it refuses to fulfil this duty, it will have accomplished a revolution in our system upon that point; *i.e.*, the will of the legislature will have triumphed over the will of the constitution-making power — the sovereign.

In the interpretation which the author places upon this part of article 4, section 4, I think he advances a doctrine in reference to the effect of the same upon the *national* governmental system which is strained and unwarranted. He says:

> In this provision the United States binds itself to itself and to its constituent members, to remain forever a republic and, in particular, a federal republic. Within the limits of the conception, republic, the Federal constitution and the state constitutions may be constitutionally subjected to every conceivable change; but the least step beyond these limits on the part of the Union is *ipso facto* legally the dissolution of the Union, unless taken by the consent of every state; and, even in this case, legally a new union would assume the place of the old.[1] [Page 128.]

[1] "In ihr verpflichten sich die Vereinigten Staaten, sich selbst und ihren konstituirenden Gliedern gegenüber, ewig eine Republik, und zwar eine Föderativrepublik

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Every constitutional lawyer knows that there is no such limitation upon the amending power to be found in the constitution itself, and that therefore it does not exist at all; and that, on the other hand, there is a limitation upon the regular course of amendment in reference to a point which might be changed ~~and yet the whole system be made even more republican than~~ it now is, *viz.*, the pledged equality of the states in the senate. This dictum of the author is, thus, doubly erroneous. In treating of the process of amendment, on pages 141 and 142, he does not mention the fact of the exception of this one subject from the usual course of amendment. Of course, he is not ignorant of its existence. The omission is, however, one that should be corrected for the sake at least of his European readers.

On page 154 we find the following declaration in regard to eligibility to the gubernatorial office in the several states:

> All male inhabitants of the state, of full age, who possess the right to vote and have been for a certain time citizens of the United States and residents of state are usually eligible to the office.[1]

This is true in reference to only seven states of the thirty-eight. Full age (*Volljährigkeit*) is in this country twenty-one years, as everybody knows; but the constitutions of three of the states require the attainment of the twenty-fifth year; those of twenty-six of the states require the attainment of the thirtieth year; and those of two of the states require the attainment of the thirty-fifth year.[2]

Finally, I have found a little trouble in verifying some of the citations and a few mistakes in translation, as, for example, on

zu bleiben. Innerhalb der Grenzen des Begriffs Republik können die Bundesverfassung und die Staatenverfassungen jeder denkbaren Veränderung verfassungsmässig unterworfen werden, aber der geringste Schritt über diese Grenzen hinaus seitens der Union ist ipso facto rechtlich die Auflösung der Union, wenn er nicht unter Zustimmung jedes einzelnen Staates gethan wird, und auch in diesem Falle würde rechtlich an Statte der alten eine neue Union getreten sein."

[1] "Das passive Wahlrecht pflegt allen volljährigen männlichen Einwohnern des Staates zuzustehen, die das aktive Wahlrecht haben und eine gewisse Zeit sowohl Bürger der Vereinigten Staaten als Einwohner des Staates sind."

[2] Poore's Constitutions. Stimson's American Statute Law, p. 46.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

page 22, where the phrase "a more perfect union" is rendered in the German, "eine vollkommene Union"; but I am inclined to regard such errors as typographical, and not to hold the author responsible.

I trust that my minute and, perhaps, too long review of this valuable work will not influence any of my readers to estimate it less highly. I certainly can give no higher evidence of my own appreciation of it than my willingness to spend so much time and labor in its examination. In the criticisms which I have offered I have been animated wholly by the feeling that what is so nearly perfect in the first edition should be made entirely so in the second.

JOHN W. BURGESS.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

III.

The Sûdan and the Mahdi.

THE SÛDAN comprises the vast region lying between the equator and the southern boundary of Egypt at the first cataract of the Nile, and extending from the Red Sea and Abyssinia on the east to a western indefiniteness — to the point, one might say, from which a slave could be carried to the Nile with some chance of profit for the slave-hunter. Since the day of Mehemet Ali, the country had been to Egypt very much what Egypt was to Turkey before the day of the great pasha. Mehemet Ali appropriated the Sûdan to himself with that free-handed robbery that was characteristic of power in the time of feudalism, and his successors, excepting perhaps Said, did all they could to keep up the system of robbery and spoliation that he had begun. On the other hand, the chiefs of the native tribes did all they could to resist the power of Egypt, often even to the point of bloodshed and murder; or paid their enforced tributes unwillingly and only after these had been diminished by all possible peculations. There was an extensive inland commerce in the Sûdan that made it a valuable province. The yield of ivory, ostrich feathers, grains, and tropical fruits was very large; but the traffic in slaves was the great industry of the country. The Sûdan supplied the slave markets of the Eastern world. It was this feature of commerce that first attracted the attention of the West to the Sûdan. It was the motive of mercy that encouraged the interference of civilized people.

Ismail, with all the ambition of Mehemet Ali, was ready to listen to any plans for increasing his authority, especially if they were suggested by Europeans. He had long entertained

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

a scheme of aggrandizement in the Sûdan; and he fancied that expeditions to suppress the slave-trade, if organized in his name, would somehow secure the extension of his power. It may be doubted if he appreciated the humanitarian motives that suggested to Englishmen the necessity of such an expedition as Sir Samuel W. Baker was deputed to lead in 1869; but he gave Sir Samuel his hearty co-operation, and appointed him governor-general of the entire region south of Gondokoro. Several years before that time Ismail had reasserted Egypt's authority, which had been suffered to lapse through the inactivity of Said and the opposition of the Sûdanese, by an extension of his dominion to the west in the conquest of Darfûr; and now he was glad to have his governor-general push on to the south. The story of Sir Samuel's attempt to reach his province, and of his success in abolishing the slave-traffic only for the time that the slave-posts were under his eye, is told in his own book, *Ismailia*. It is enough to state here that, despite his strenuous and most worthy efforts, he made no permanent impression upon the trade he sought to wipe out; on the contrary, by his opposition to the most influential men of the Sûdan, the slave-traders, he brought Egypt into greater odium than before, and increased the hatred that had always been felt for Egyptian rule.

The successor of Sir Samuel Baker was Colonel Charles George Gordon, familiarly known as "Chinese Gordon" from his remarkable career in the suppression of the Tai-ping rebellion in China. He was, perhaps, the most humane man in England; but his character was as firm as it was sweet, and his courage was as great as his pity. Of the man whose name has been for years a household word among the civilized and the heathen, whose feats have won the admiration of the world, and whose charities have been the inspiration of the rich and the comfort of the poor, further characterization is needless. Suffice it to say that Gordon had the qualities that fitted him pre-eminently for the work he undertook when, in 1874, he started upon his mission to the Sûdan. He did not give Ismail credit for much philanthropy; for, before he left Cairo for Khartûm, he wrote to England:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

I think I can see the true motive of the expedition, and believe it to be a sham to catch the attention of the English people: and feel like a Gordon who has been humbugged.[1]

Going to the Equatorial Province, however, solely on the authority of Ismail, he did not question the latter's motives too closely, but applied himself to the work of the expedition. He was to establish a series of posts between Khartûm and Gondokoro and to suppress the slave-trade. In eighteen months Gordon returned to Cairo and resigned his commission under the khédive. This is what he had done at that time:

He had mapped the White Nile from Khartûm to within a short distance of the Victoria Nyanza. He had given to the slave-trade on the White Nile a deadly blow. He had restored confidence and peace among the tribes of the Nile valley, so that they now freely brought into the stations their beef, corn, and ivory for sale. He had opened up the water communication between Gondokoro and the Lakes. He had established satisfactory relations with King M'tesa. He had formed Government districts, and established secure posts with safe communication between them. He had contributed a revenue to the Khédivial exchequer, and this without oppression. The Tai-ping Rebellion established Gordon's genius as a military commander; the Equatorial Provinces, when he left them, testified not less to his genius as a philanthropic and practical administrator.[2]

Gordon resigned because Ismail Yakûb, the governor-general of the Sûdan, threw so many stumbling-blocks in his way. While he was doing all he could to suppress the slave-trade, Ismail Yakûb was doing all he could to foster it. At the beginning of 1877 the khédive removed the latter, and wrote the following to Gordon (February 17):

Setting a just value on your honorable character, on your zeal, and on the great services you have already done me, I have resolved to bring the Sûdan, Darfûr, and the provinces of the Equator, into one vast province, and place it under you as Governor-General.[3]

Gordon accepted the larger responsibilities and duties of the office bestowed upon him. For two years and more he

[1] Archibald Forbes, Chinese Gordon, p. 125. [2] *Ibid.*, p. 157. [3] *Ibid.*, p. 159.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

worked with indomitable energy in crushing the slave-traffic, in putting down insurrection, and in establishing his authority throughout the vast provinces nominally under his control. In spite of almost insuperable difficulties in the way of inadequate resources, both military[1] and financial, he accomplished wonders. If he had been content to remain at Khartûm after the fall of Ismail, the fame and fear of the False Prophet might never have been known in Egypt; but he was disgusted with the abdication, and insisted upon resigning, to the no small relief, probably, of the new khédive and his ministers, who were glad to be rid of all the servants of Ismail.

After Gordon left the Sûdan, in 1879, an Egyptian pasha was appointed governor-general, and the country relapsed into its former feeling of bitterness toward Egyptian rule. It was not long before the disaffection found its leader. He was no less a person than the Mahdi, whose coming had been foretold by the prophet Mohammed. He chose an opportune moment to act as the champion of his people. They had been incensed at the suppression of the slave-trade, they hated the Egyptian rule, and they believed that the fourteenth century of the Hegira, which was close at hand, would, in accordance with prophecy, usher in an era of unexampled prosperity and happiness.

Mehemet Ahmed, who called himself the Mahdi, was an obscure carpenter's son, who had studied religious creeds with one sect of dervishes in Khartûm and with another sect in Berber until 1870, when he became a *fakir*, or dervish-chief, himself. He then retired to the island of Abba, on the White Nile, where he became famed for his piety. He lived in a cave, and gave himself up to prayers, fastings, and mortifications of the flesh. He won a wide notoriety, and made many disciples. Rich gifts were bestowed upon him, and the neighboring sheikhs gladly gave him their daughters in marriage. His brotherhood in Khartûm heard of his devotion, wealth, and influence, and sent to him, early in 1881, a messenger to bid him arise, in answer to the call of God, and lead a great army.

[1] "The Sûdan had been well-nigh drained of troops for the support of the sultan in his war with Russia." *Ibid.*, p. 162.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Mehemet Ahmed took up the sword at once, and in May declared to the *fakirs* of the faith of the Shiites that he was the Imam Mahdi, the new Messiah who had come to lead new believers into the fold of Islam, and to annihilate all the infidels on the face of the earth. His declaration met with no denial among the Shiites, whose religious order was confined almost wholly to the Sûdan; but at Cairo, Constantinople, and Mecca, the report of a Mahdi was scoffed at. Where were the signs[1] and portents that should herald his coming?

But the Mahdi set about the establishment of "a universal equality, a universal law, a universal religion, and a community of goods,"[2] and swore that he would visit with death all who did not believe in and follow him. In August, Raûf Pasha, the governor-general of the Sûdan, became alarmed at the growing power of the False Prophet, — for such he had been declared by the ulemas of Constantinople and Cairo and the Grand Sherif of Mecca, the highest priest of Islam, — and he sent an army to crush him. But the Mahdi easily repulsed the Egyptian[3] force, as he did also a stronger force sent against him at the end of 1881. In June, 1882, he fought his first great battle,

[1] "The greater signs, among which the coming of the Mahdi is reckoned, are seventeen in all, and it must be confessed that some at least among these seem unlikely to be, for the present, literally fulfilled. The sun must rise in the west; the beast must emerge from the earth near Mecca; the walls of Stambûl must fall by miracle before an invading foe; the *Messîh ed Dejâl*, or 'Lying Anointed One,' marked K F R on his forehead, one-eyed, and riding from Irak on an ass, must lay waste the earth. The true Messiah (our Lord Jesus) must appear on the minaret at Damascus, must reign in Jerusalem, and defeat Gog and Magog, and slay ed Dejâl at the gate of Lydda. A massacre of the Jews, and invasion of Syria by the great giants (Gog and Magog), who are to drink dry the sea of Galilee, a smoke which shall fill the world, a relapse of Arabia into paganism, the discovery of hid treasures in the Euphrates, the destruction of the Kaaba by negroes, beasts and stones speaking with human voices, a fire of Yemen, a man of the sons of Kahtan wielding a rod, and an icy wind from Damascus which shall sweep away the souls of all who have faith as a grain of mustard-seed, and blow to heaven the Koran itself; these are the wonders which, together with the coming of the Mahdi, will prepare the way for the tremendous *Yôssr ed Dîn*, or final day of judgment." — C. R. Conder, The Guide of Islam, in *The Fortnightly Review*.

[2] A. Egmont Hake, The Story of Chinese Gordon, vol. ii., p. 24.

[3] The government forces in the Sûdan were in large part made up of Egyptian soldiers, the Sûdanese soldiers being sent to Egypt in at least equal numbers. This exchange of military was held one of the chief grievances against Egyptian rule.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and won a brilliant victory. Abdel Kadir, who had succeeded Raûf Pasha as governor-general, sent out the strongest force he could muster; but it was overwhelmingly defeated by the Mahdi's fanatical followers. Not a commander escaped with his life, and nearly every Egyptian soldier perished. And now for a time the False Prophet had things pretty much his own way. Arabi's rebellion not only diverted attention from the Sûdan, but it drew largely upon the Sûdanese garrisons for troops to support the nationalist cause. The Mahdi became more and more aggressive, and his ranks and his coffers were continually filling. But, in attacking El Obeid, he was repulsed with heavy loss. He was beaten off only temporarily, however; for he soon returned and laid siege to the garrison, which was finally compelled to yield, January 15, 1883. The commander of the garrison and many of his subordinates saved their lives by taking service under the Mahdi's standard.

The news of the fall of Obeid reached Egypt about the beginning of February. The insurrection was sufficiently serious to demand the attention of the khédive. Lord Dufferin, however, advised letting the Mahdi alone so long as he remained in Kordofan. But the Egyptian government determined upon an expedition, and entrusted its command to Colonel Hicks, a retired English officer. It was impossible, so soon after Arabi's rebellion, to send as strong a force as was desirable. The expedition consisted of eight English officers, 6000 infantry, 1000 irregulars, 500 cavalry, and a small force of artillery. The English government in no way sanctioned the undertaking, nor did they oppose it. Lord Granville gave Sir Edward Malet, the British consul at Cairo, positive orders not to offer any advice on the question. After the first engagement between Hicks and the rebels, April 9, in which the former achieved a brilliant success, Hicks made many appeals to Malet for reinforcements; but the latter merely passed them on to the Egyptian government without comment. As Mr. McCarthy puts it:

> Though England had interfered in Egypt by force of arms to keep the Khédive on his throne, though Cairo was occupied by English soldiers, though it was clearly in England's power, and in her right, to counsel

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the Egyptian ministry as to the course they should pursue in the most difficult of all Egyptian questions, the ministry still affected to keep up the absurd pretense of exercising no influence upon the councils of Egypt.[1]

England could not shirk her responsibility by keeping silent. She was bound in all honor to give her advice at least; and refusing, she failed of her just duty and obligations.[2]

The summer and rainy season of 1883 were passed by Hicks Pasha in Khartûm; but on the 9th of September he set out for El Obeid, the stronghold of the Mahdi. The story of his march and the details of the final tragedy will probably never be authentically told. The last bits of news were in the letters of Edmund O'Donovan to a London newspaper. He seems to have appreciated the dangers of the expedition. On September 23, he wrote to a friend:

> It would be odd if the next intelligence from this part of the world told that I, too, had gone the way of all flesh. However, to die even out here, with a lance-head as big as a shovel through me, will meet my views better than the slow, gradual sinking into the grave which is the lot of so many. . . . You know I am by this time, after an experience of many years, pretty well accustomed to dangers of most kinds, even some *extra*. Yet I assure you I feel it terrible to face deadly peril far away from civilized ideas, and where no mercy is to be met with, in company with cravens that you expect to see run at every moment, and who will leave you behind to face the worst.

When this friend next heard of O'Donovan, he had "gone the way of all flesh."

The accepted account of the slaughter of Hicks Pasha's army of 11,000 men is that, having been treacherously led into an ambuscade on the 1st or 2d of November, they fought for three days with the courage and hopelessness of that smaller band under Leonidas at Thermopylæ; then, overcome with heat,

[1] Justin McCarthy, England under Gladstone, ch. xv.

[2] "Why, then, it may be asked, did not the Liberal Government use its influence to prohibit General Hicks's useless expedition? The question very plausibly suggests English responsibility for the expedition, and the consequences, or supposed consequences of its failure." English Policy in the Sûdan, *British Quarterly Review*, July, 1884.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

thirst, and fatigue, their ammunition gone, they fell where they had fought, before the fury of the Mahdi's hordes. All the Egyptians were massacred, and only one European is known to have escaped.

It was more than two weeks before the terrible news reached Khartûm and was telegraphed to Cairo. It would be difficult to say whether the panic was greater in Egypt or in the Sûdan. In the Sûdan, governors of provinces, at the report of the Mahdi's victory, declared their allegiance to the holy cause, and flocked to his capital with troops and treasure. Nothing succeeds like success. The vast region from Kordofan to the equator was kindled to a fanatical zeal. The route from Khartûm to Sûakim, on the Red Sea, was intercepted by a lieutenant of the Mahdi's. The grasp of the Mahdi seemed to be closing about Khartûm. Colonel de Coetlogen, with his slender garrison of 4000, could not hold that city before the sweep of the rebel forces. In Cairo the consternation was no greater over the defeat than over England's opposition to an expedition to crush the Mahdi. Lord Granville telegraphed to Sir Evelyn Baring, who was now the British representative in Egypt, that the government would lend neither English nor Indian troops to assist an expedition. He advised the abandonment of the Sûdan. But the khédive's ministers said that they could not give up the territory that belonged to the sultan, and of which Egypt was simply the guardian. While negotiations between England and Egypt were pending, the khédive's government decided to send a force to Sûakim to relieve the beleaguered Egyptian garrisons at Sinkat and Tokar, and open the route from the Red Sea to Berber, so as to allow the Egyptians in Khartûm a way of escape. The expedition was placed under the command of Baker Pasha.

But now, January 4, 1884, Mr. Gladstone's government expressed its advice more forcibly than a month before.

It is indispensable [wrote Lord Granville] that her Majesty's Government should, as long as the provisional occupation of the country by English troops continues, be assured that the advice which, after full consideration of the Egyptian Government, they may feel it their duty

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to tender to the Khédive should be followed. It should be made clear to the Egyptian ministers and governors of the provinces that the responsibility which, for the time, rests on England, obliges her Majesty's Government to insist on the adoption of the policy which they recommend; and that it will be necessary that those ministers and governors who do not follow this course should cease to hold their offices.

This was what Mr. McCarthy calls "interference with a vengeance."[1] It was the decisive, if tardy, assertion of authority. The note was equivalent to saying that, in future, England's will was to be the law of Egypt. From Downing Street the order was issued that the Sûdan must be abandoned, whereupon Sherif's ministry resigned. Nubar Pasha was called to his place; and he telegraphed at once, of course at England's dictation, to Baker, at Sûakim, that he must prepare for evacuation.

But the question now presented itself: How should the evacuation be effected? The answer was furnished by the *Pall Mall Gazette*, of London. Its issue of January 9 contained the following suggestion:

At present it is obviously out of the question to send an army of relief to Colonel Coetlogen. Baker Pasha's force seems inadequate even to relieve Sinkat. In common with the ex-Khédive, of whom he speaks with remarkable cordiality, General Gordon deprecates the despatch of either Indian or English troops to the Sûdan. 'But if we have not an Egyptian army to employ in the service, and if we must not send an English force, what are we to do? There is only one thing that we can do. We cannot send a regiment to Khartûm, but we can send a man who, on more than one occasion, has proved himself more valuable in similar circumstances than an entire army. Why not send Chinese Gordon with full powers to Khartûm, to assume absolute control of the territory, to treat with the Mahdi, to relieve the garrisons, and do what can be done to save what can be saved from the wreck in the Sûdan? . . . No one can deny the urgent need in the midst of that hideous welter of confusion for the presence of such a man, with a born genius for command, an unexampled capacity in organizing "ever-victorious armies," and a perfect knowledge of the Sûdan and its people. Why not send him out with *carte blanche* to do the best that can be

[1] England Under Gladstone, ch. xv.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

done? He may not be able single-handed to reduce that raging chaos to order, but the attempt is worth making, and if it is to be made, it will have to be made at once.

The popular feeling was found to be heartily in accord with this suggestion, and a clamor was immediately raised on all sides for the despatch of Gordon to the Sûdan. The British government, some weeks before, had offered to appoint an English officer to go to Khartûm and organize the evacuation; but the Egyptian ministry had not taken up the offer. Now, however, Nubar informed Sir Evelyn Baring that such an appointment would be accepted. The British government, therefore, at once communicated with Gordon, recalling him from Brussels on the 17th of January, where he had just arrived to receive the last instructions of the king of Belgium, before proceeding on an anti-slavery mission to the Congo. He returned to London that same day, and on the morning of the 18th was closeted with members of the English cabinet. On Saturday, the 19th, the London *Times* startled the world with the following announcement:

It will be a welcome surprise to the country to learn that General Gordon started last night, not for the Congo, but for Egypt. . . . . He takes with him, as his military secretary, Lieutenant-Colonel Stewart, who was on duty at Khartûm so late as last year, and whose knowledge of the affairs of the Sûdan is second only to that of General Gordon himself. The immediate purpose of the General's mission is, we understand, to report on the military situation in the Sûdan, to provide in the best manner for the safety of the European population of Khartûm and of the Egyptian garrisons still in the country, as well as for the evacuation of the Sûdan with the exception of the seaboard. His appointment will be received by the country with a certain sense of relief, as showing that the Government has been willing to seek the best advice and to select the most competent agent for the development of its policy in the Sûdan.

The Mission of Gordon. Operations in the Eastern Sûdan.

England had now taken a firm stand. She largely increased her responsibilities by entrusting Gordon with the Sûdanese mission. She had been niggardly even with advice in the case

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of Hicks, but she was ready to hazard all with Gordon. Her unquestionable responsibility will be proved by the following documents. The day that Gordon left London, Lord Granville gave him this note of instruction:

FOREIGN OFFICE, Jan. 18th, 1884.

Sir: — Her Majesty's Government are desirous that you should proceed at once to Egypt, to report to them on the military situation in the Sûdan and on the measures which it may be advisable to take for the security of the Egyptian garrisons still holding possession in that country, and for the safety of the European population in Khartûm. You are also desired to consider and report upon the best mode of effecting the evacuation of the interior of the Sûdan, and upon the manner in which the safety and the good administration by the Egyptian Government of the ports on the seacoast can best be secured. In connection with this subject, you should pay especial consideration to the question of the steps that may usefully be taken to counteract the stimulus which it is feared may possibly be given to the slave trade by the present insurrectionary movement and by the withdrawal of the Egyptian authority from the interior. You will be under the instructions of her Majesty's Agent and Consul-General at Cairo, through whom your reports to her Majesty's Government should be sent under flying seal. You will consider yourself authorized and instructed to perform such other duties as the Egyptian Government may desire to entrust to you, and as may be communicated to you by Sir E. Baring. You will be accompanied by Colonel Stewart, who will assist you in the duties thus confided to you. On your arrival in Egypt you will at once communicate with Sir E. Baring, who will arrange to meet you, and will settle with you whether you should proceed direct to Sûakim, or should go yourself or despatch Colonel Stewart to Khartûm, *via* the Nile.

I am, *etc.*, GRANVILLE.

While Gordon was on his way to Egypt he wrote the following notes, explanatory of the above instructions, and developed in accordance with the views expressed at the conference on January 18. These notes were forwarded from Cairo to the Foreign Office at London.

I understand that her Majesty's Government have come to the irrevocable decision not to incur the very onerous duty of securing to the peoples of the Sûdan a just future government. That, as a consequence, her Majesty's Government have determined to restore to these peoples

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

their independence, and will no longer suffer the Egyptian Government to interfere with their affairs.

2. For this purpose her Majesty's Government have decided to send me to the Sûdan to arrange for the evacuation of these countries, and the safe removal of the Egyptian employés and troops.

3. Keeping paragraph 1 in view, *viz.*, that the evacuation of the Sûdan is irrevocably decided on, it will depend on circumstances in what way this is to be accomplished. My idea is that the restoration of the country should be made to the different petty Sultans who existed at the time of Mehemet Ali's conquest, and whose families still exist; that the Mahdi should be left altogether out of the calculation as regards the handing over the country; and that it should be optional with the Sultans to accept his supremacy or not. As these Sultans would probably not be likely to gain by accepting the Mahdi as their sovereign, it is probable that they will hold to their independent positions. Thus we should have two factors to deal with; namely, the petty Sultans asserting their several independence, and the Mahdi's party aiming at supremacy over them. To hand, therefore, over to the Mahdi the arsenals, *etc.*, would, I consider, be a mistake. They should be handed over to the Sultans of the states in which they are placed. The most difficult question is how and to whom to hand over the arsenals of Khartûm, Dongola, and Kassala, which towns have, so to say, no old standing families, Khartûm and Kassala having sprung up since Mehemet Ali's conquest. Probably it would be advisable to postpone any decision as to these towns till such time as the inhabitants have made known their opinion.

4. I have, in paragraph 3, proposed the transfer of the lands to the local Sultans, and stated my opinion that these will not accept the supremacy of the Mahdi. If this is agreed to and my supposition is correct as to their action, there can be but little doubt that, as far as he is able, the Mahdi will endeavor to assert his rule over them, and will be opposed to any evacuation of the Government employés and troops. My opinion of the Mahdi's force is, that the bulk of those who were with him at Obeid will refuse to cross the Nile, and that those who do so will not exceed 3000 or 4000 men; and also, that these will be composed principally of black troops who have deserted, and who, if offered fair terms, would come over to the Government side. In such a case, *viz.*, "Sultans accepting transfer of territory and refusing the supremacy of the Mahdi, and Mahdi's black troops coming over to the Government," resulting weakness of the Mahdi, what should be done should the Mahdi's adherents attack the evacuating columns? It cannot be supposed that these are to offer no resistance, and if in resisting they should obtain a success, it would be but reasonable to allow them to follow up the Mahdi

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to such a position as would insure their future safe march. This is one of those difficult questions which our Government can hardly be expected to answer, but which may arise, and to which I would call attention. Paragraph 1 fixes irrevocably the decision of the Government, *viz.*, to evacuate the territory, and, of course, as far as possible, involves the avoidance of any fighting. I can therefore only say, that having in view paragraph 1, and seeing the difficulty of asking her Majesty's Government to give a decision or direction as to what should be done in certain cases, that I will carry out the evacuation as far as possible according to their wish to the best of my ability, and with avoidance, as far as possible, of all fighting. I would, however, hope that her Majesty's Government will give me their support and consideration, should I be unable to fulfil all their expectations.

5. Though it is out of my province to give any opinion as to the action of her Majesty's Government in leaving the Sûdan, still, I must say it would be an iniquity to reconquer these peoples, and then hand them back to the Egyptians without guarantees of future good government. It is evident that this we cannot secure without an inordinate expenditure of men and money. The Sûdan is a useless possession, ever was so, and ever will be so. Larger than Germany, France, and Spain together, and mostly barren, it cannot be governed except by a Dictator, who may be good or bad. If bad, he will cause constant revolts. No one who has ever lived in the Sûdan can escape the reflection: "What a useless possession is this land." Few men can stand its fearful monotony and deadly climate.

6. Said Pasha, the Viceroy before Ismail, went up to the Sûdan with Count F. de Lesseps. He was so discouraged and horrified at the misery of the people, that at Berber Count de Lesseps saw him throw his guns into the river, declaring that he would be no party to such oppression. It was only after the urgent solicitation of European consuls that he reconsidered his decision. Therefore, I think her Majesty's Government are fully justified in recommending the evacuation, inasmuch as the sacrifices necessary toward securing a good government would be far too onerous to admit of such an attempt being made. Indeed, one may say it is impracticable at any cost. Her Majesty's Government will now leave them as God has placed them; they are not forced to fight among themselves, and they will no longer be oppressed by men coming from lands so remote as Circassia, Kurdistan, and Anatolia.

Colonel Stewart, also, while on the way to Cairo, addressed some observations to the Foreign Office, of which the following is of some importance as showing Gordon's independence of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Egypt and direct dependence upon England as the authority of his actions:

I, of course, understand that General Gordon is going to the Sûdan with full powers to make all arrangements as to its evacuation, and that he is in no way to be interfered with by the Cairo Ministers; also, that any suggestions or remarks that the Cairo Government would wish to make are to be made directly to him and her Majesty's Minister Plenipotentiary, and that no intrigues are to be permitted against his authority. Any other course would, I am persuaded, make his mission a failure.

While Gordon was in Cairo, Sir Evelyn Baring communicated to him the following additional instructions:

Lord Granville "authorized and instructed you to perform such duties as the Egyptian Government may desire to entrust to you, and as may be communicated to you by Sir E. Baring." I have now to indicate to you the views of the Egyptian Government on two of the points to which your special attention was directed by Lord Granville. These are, (1) the measures which it may be advisable to take for the security of the Egyptian garrisons still holding positions in the Sûdan, and for the safety of the European population in Khartûm; (2) the best mode of effecting the evacuation of the interior of the Sûdan. These two points are intimately connected, and may conveniently be considered together. It is believed that the number of Europeans at Khartûm is very small, but it has been estimated by the local authorities that some 10,000 to 15,000 people will wish to move northward from Khartûm only when the Egyptian garrison is withdrawn. These people are native Christians, Egyptian employés, their wives and children, *etc.* The Government of his Highness the Khédive is earnestly solicitous that no effort should be spared to insure the retreat both of these people and of the Egyptian garrison without loss of life. As regards the most opportune time and the best method for effecting the retreat, whether of the garrison or of the civil populations, it is neither necessary nor desirable that you should receive detailed instructions. A short time ago the local authorities pressed strongly on the Egyptian Government the necessity for giving orders for an immediate retreat. Orders were accordingly given to commence at once the withdrawal of the civil population. No sooner, however, had these orders been issued than a telegram was received from the Sûdan, strongly urging that the orders for commencing the retreat should be delayed. Under these circumstances, and in view of the fact that the position at Khartûm is now represented

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

as being less critical for the moment than it was a short time ago, it was thought desirable to modify the orders for the immediate retreat of the civil population, and to await your arrival. You will bear in mind that the main end to be pursued is the evacuation of the Sûdan. This policy was adopted, after very full discussion, by the Egyptian Government, on the advice of her Majesty's Government. It meets with the full approval of his Highness the Khedive, and of the present Egyptian Ministry. I understand, also, that you entirely concur in the desirability of adopting this policy, and that you think it should on no account be changed. You consider that it may take a few months to carry it out with safety. You are further of opinion that "the restoration of the country should be made to the different petty Sultans who existed at the time of Mehemet Ali's conquest, and whose families still exist"; and that an endeavor should be made to form a confederation of those Sultans. In this view the Egyptian Government entirely concurs. It will, of course, be fully understood that the Egyptian troops are not to be kept in the Sûdan merely with the view to consolidating the power of the new rulers of the country. But the Egyptian Government has the fullest confidence in your judgment, your knowledge of the country, and of your comprehension of the general line of policy to be pursued. You are, therefore, given full discretionary power to retain the troops for such reasonable period as you may think necessary, in order that the abandonment of the country may be accomplished with the least possible risk of life and property. A credit of £100,000 has been opened for you at the Finance Department, and further funds will be supplied to you on your requisition when this sum is exhausted. In undertaking the difficult task which now lies before you, you may feel assured that no effort will be wanting on the part of the Cairo authorities, whether English or Egyptians, to afford you all the co-operation and support in their power.

On the 26th of January, General Gordon, Colonel Stewart, and the newly-appointed sultan of Darfûr,[1] with no escort beyond their personal attendants, left Cairo for Khartûm, by way of Siût, Assûan, Wady Halfa, Abû Hamed, and Berber.

While this daring party was hastening toward Khartûm, as swiftly as railway, steamer, and camel could carry them, events of a portentous nature were occurring elsewhere. On the 5th of February the British Parliament was opened, and on the

[1] The khédive had reinstated the heir to the sultanship, who was a captive in Cairo, as the first step toward carrying out Gordon's policy.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

same day the news was received in London that Baker Pasha had been defeated near Tokar, with a loss of 2000 men, and had fallen back with the remainder of his army — some 1200 — on Trinkitat, himself escaping death by a reckless dash through the Arab ranks. Osman Digna, the Mahdi's lieutenant, had carried all before him. Trinkitat could not hold out against him, and fears were entertained even for Sûakim, although Admiral Hewett had just landed a force there. These were not favorable auspices for the opening of Parliament. The customary placid language of the Queen's speech was strangely at variance with the feelings of those who listened to it. A vote of censure upon the government was at once moved, but it was rejected in the form offered, and the subject was postponed for a few days. In the meantime public opinion on the necessity of active interference and responsibility had strengthened to the point of insistance. The London *Times* voiced the widespread sentiment in saying:

> This fatuous effort to evade the grasp of facts must now be abandoned, and even with respect to the past the world will be obstinately incredulous. Not only in Europe, as may be seen from the strong language used by the French press, but among the Mahommedan populations of the East, England is held to be responsible for the expeditions of Hicks Pasha and Baker Pasha not less than for the mission of General Gordon.[1]

The excitement caused by the news of Baker's defeat was further increased by the report of the slaughter of the Sinkat garrison. Baker's expedition had utterly failed in the offensive. The vote of censure came on the 12th. The identical motion was offered in the upper House by Lord Salisbury, and in the lower House by Sir Stafford Northcote:

> That this House, having read and considered the correspondence relating to Egypt, laid on the table by her Majesty's command, is of opinion that the recent lamentable events in the Sûdan are due, in a great measure, to the vacillating and inconsistent policy pursued by her Majesty's Government.

[1] *The Times*, February 7, 1884.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The motion was carried against the government by one hundred majority in the House of Lords, but it was lost in the House of Commons, where Mr. Gladstone made an ingenious defence of his policy of non-intervention, and of his claim of irresponsibility for the slaughter of the Hicks and the defeat of the Baker expedition. Relief had not been sent to Sinkat, because it was believed that such a move would endanger the lives of Gordon and those whom he had been sent to rescue, and the chief desire of her Majesty's government was to secure the evacuation, the peaceful evacuation, of the interior of the Sûdan. England was the guardian of Egyptian interests, and the welfare of the land demanded that Gordon's mission should be successfully executed. "For," said Mr. Gladstone, "I look upon the possession of the Sûdan — I won't say as a crime — that would be going a great deal too far — but I look upon it as the calamity of Egypt. It has been a drain on her treasury, it has been a drain on her men." The government was saved in the Commons by a majority of forty-nine.

In spite, now, of the reasons assigned for not having rescued the garrison of Sinkat, the English government authorized the despatch of General Graham for the relief of Tokar, Admiral Hewett having already, with English sanction, assumed the general command of forces at Sûakim. Before Graham had landed his force at Trinkitat, however, Tokar had succumbed, the greater part of the garrison joining the standard of Osman Digna. On the last day of February, Graham marched forth and met and overcame the intrepid lieutenant of the Mahdi on the field where Baker's force had been defeated. This success was followed up by further advances, and on March 13 a decisive victory was won. The backbone of the Mahdi's power in the eastern Sûdan seemed broken. But at this junction General Graham was ordered to embark his troops and leave the seat of war at once. This was a fatal order. Then was the time, Osman's forces having been beaten and scattered, to open the route from Sûakim to Berber, and afford an egress for the garrisons of the interior. The opportunity was missed and never was presented again. Osman gathered together his

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

forces, strengthened his power at his leisure, and held himself in readiness to carry out his old threat of sweeping Sûakim and every soul it contained into the Red Sea.

Gordon at Khartûm, and the Government in London.

We left General Gordon on his way to Khartûm. He arrived there on February 18. At Berber he had issued a proclamation declaring the purpose and policy of his mission. He had come to establish tranquillity and prevent the shedding of Moslem blood; to secure to the inhabitants their rights of property, and put an end to injustice and oppression. He reduced the taxes one-half, and wiped off all arrearages. He conferred upon the people the right, of which they had been deprived at the expense of time, treasure, and blood, to hold slaves as property, with full control over their services. He guaranteed them the privileges they enjoyed under Said Pasha, and promised prosperity and happiness. In consequence of this proclamation Gordon's journey from Berber to Khartûm was a triumphal march. The natives flocked to bless him as their king and deliverer, and he was received at Khartûm with cries of rejoicing. His proclamation had a very different effect in the outside world. European nations stood aghast. Gordon, the arch enemy of the slave-trade, declared himself its friend! England received the news with consternation and horror. Every Wilberforce of the nation raised his voice of protest. The clamor precipitated a second vote of censure, which was offered by M. Labouchere on March 15, the ground of censure, however, being nominally the useless waste of life in the operations about Sûakim. The government barely escaped defeat, the majority being only seventeen. The criticism on General Gordon for his slave-trade proclamation was as blind as his policy was far-sighted. He had been sent to secure the evacuation of the Sûdan, after which every sane man knew the country would return to its old traffic; for Gordon could scarcely be expected to say: We are to withdraw, but you are to frown upon the slave-trade just as though we were here to compel

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

you. The peaceful evacuation, Gordon well knew, could only be secured by conciliation, and the best favors to grant were those the people were bound to gain. The wisdom of his proclamation needed no further proof than the excessive friendliness of the greetings along his march and of his reception at Khartûm.

Gordon devoted his first day in Khartûm to acts of mercy. He said to the people: "I come without soldiers, but with God on my side, to redress the evils of this land. I will not fight with any weapons but justice." He won the hearts of all at once by burning the government books and all instruments of torment and torture, by releasing the unjustly imprisoned, and by devoting himself personally to the sick and the wronged. That first day, also, he sent a despatch to Sir Evelyn Baring, saying that it would be folly to leave the Sûdan unless some one were to take his place as governor-general. Anarchy and misery would surely ensue. He named Zubair Pasha[1] as the one above all others to select for the position. "He alone," he wrote, "has the ability to rule the Sûdan, and would be universally accepted by the Sûdan." Sir Evelyn Baring forwarded the suggestion the next day to Earl Granville, and heartily urged its adoption, believing, as he said, that Zubair was the only possible man.

It had been supposed, and, in fact, General Gordon himself had so understood it, that he was to have the dictatorial power in the Sûdan that the crisis demanded. The English government, however, immediately repelled the notion of appointing old slave-trading Zubair governor-general. A long series of telegrams passed between Gordon, Baring, and Granville on the subject. Gordon besought and Baring expostulated; but the government was blind to all reason — to everything but the fear of a renewal of the slave-trade, which, in point of fact, was assured the day the evacuation of the Sûdan was decided upon.

[1] Zubair had had great power in the Sûdan, where he was king of the slave-traders. He was, at this time, confined in Cairo, his captivity being lightened by a liberal allowance. Zubair was supposed to bear an undying grudge against Gordon, because Gordon had killed his (Zubair's) son in the Sûdan during a previous campaign.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

General Gordon afterward reduced the government's reasoning on this point to a simple form:[1] "I will not send up A., because he will do this; but I will leave the country to B., who will do exactly the same." Baring telegraphed to Granville (March 9):

> As regards slavery, it may certainly receive a stimulus from the abandonment of the Sûdan by Egypt; but the despatch of Zubair Pasha to Khartûm will not affect the question one way or the other. No middle course is possible so far as the Sûdan is concerned. We must either virtually annex the country, which is out of the question, or else we must accept the inevitable consequences of abandonment.

But the British government wished to abandon the Sûdan, and yet avoid the "inevitable consequences." Gordon maintained that to prevent anarchy it was necessary to "smash up" the Mahdi, and that Zubair was the only one who had enough influence and prestige of family to do it. Gordon could not bear the thought of leaving the Sûdan to ruin. He sent, March 8, a further argument, that should have had some weight with the government: "If you do not send Zubair, you have no chance of getting the garrisons away; this is a heavy argument in favor of sending him."

But it was no use. On March 28, Earl Granville sent a long note to Sir Evelyn Baring, in which he reviewed the discussion at length, and even rehearsed the slavery antecedents of Zubair. It is impossible, after all the months that have intervened since that note was written, to read it dispassionately. Granville wrote:

> Her Majesty's Government, on the perusal of General Gordon's advice, were under the impression that he gave undue weight to the assumed necessity of an immediate evacuation of Khartûm, and they inquired whether it was urgent to make an arrangement at once to provide for his successor, expressing a hope that General Gordon would remain for some time.

In other words, her Majesty's government thought that the "necessity of an immediate evacuation" could be more judiciously determined in Downing Street than in Khartûm. The

[1] General Gordon's Journal, p. 42. (September 17.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

question could be decided certainly more safely. It is not necessary to go through Lord Granville's note in detail. The vain desire is clearly manifest throughout, that Gordon should not *abandon* the Sûdan in *evacuating*. Gordon said that he could pursue but one course; Granville denied him that, but suggested no alternative. "Let Gordon stay a while: the government will deliberate. So far as is known, he is not in any immediate danger at Khartûm. We will not let Zubair leave Cairo." That was the gist of the note. A week later, Mr. Gladstone naïvely remarked that General Gordon could leave Khartûm "at any time if he felt so disposed." Little did he know the fibre of the man's honor if he thought he could, under any conditions, "feel disposed" to desert the garrisons he had been sent to rescue. He felt that the lives of some 29,000 persons, composing the garrisons at Bahr Ghazelle, Sennar, Kassala, Khartûm, Shendy, Berber, Abû Ḥamed, and Dongola were in his hands. He would not be false to his trust.

The story of Gordon's government at Khartûm, of his dealings with the people, of his sorties against the threatening forces of the Mahdi, and of his untiring zeal and dauntless personal courage, is told in his own journals[1] and despatches to Sir Evelyn Baring, and in the letters of Mr. Power, the correspondent of the London *Times*. Our concern is less with those details than with the relations existing between Gordon and the British government. The Egyptian government quite drops out of notice, all negotiations proceeding independently of the khédive.

From first to last, so long as communication was kept up with Gordon, the British government pursued a policy of opposition to his proposals. His long-continued and persistent calls for Zubair were disregarded. He desired permission to proceed to El Obeid for a peaceful negotiation with the Mahdi, whom

[1] A large and very valuable part of Gordon's journals was lost when Colonel Stewart's party was massacred, in September, 1884. Gordon had entrusted them to that officer, believing that they would be safer than if kept by himself, in Khartûm. Stewart's journals, which Gordon considered very valuable, were lost at the same time. *Vide seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

he appointed sultan[1] of Kordofan; but he was told to remain at Khartûm. He said that Berber should be relieved, and that the route from Sûakim to Berber should be kept open; instead of this, the British troops were withdrawn from the Red Sea littoral. He desired that Turkish troops should be sent there; but this proposal was vetoed, presumably on diplomatic grounds. He wished to go from Khartûm to Bahr Ghazelle and the Equatorial Provinces; but he was told again not to proceed beyond Khartûm. He begged that troops be sent to Wady Halfa and Assûan; but the request was refused. Later he urged the necessity of a British diversion at Berber; but his plea was not heeded. Was it not strange that the English government should have sent Gordon to the Sûdan with the explicit understanding that his judgment should determine the means and methods of evacuation, and then never, in any essential particular, follow his advice? The world called it almost a crime. Early in April, Gordon sent an undated message to Sir Evelyn Baring, containing the following words:

> As far as I can understand, the situation is this: You state your intention of not sending any relief up here or to Berber, and you refuse me Zubair. I consider myself free to act according to circumstances. I shall hold on here as long as I can; and if I can suppress the rebellion, I shall do so. If I cannot, I shall retire to the Equator; and leave you the indelible disgrace of abandoning the garrisons of Sennar, Kassala, Berber, and Dongola, with the certainty that you will, eventually, be forced to smash up the Mahdi under great difficulties, if you would retain peace in Egypt.

As Mr. Hake says: "The breach was complete. The great soldier declined to serve as an instrument of dishonor."[2]

In England the bitterest criticism was heaped upon Mr. Gladstone. The Liberals in Parliament became hostile to their own government. On the 12th of May a third vote of censure was proposed, in which the government was charged with indifference to the success of Gordon's mission and the safety of his

[1] The appointment was scornfully rejected by the Mahdi, who sent dervishes to Gordon, ordering him to embrace the Moslem faith.

[2] The Story of Chinese Gordon, vol. ii., p. 166.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

person. Again the government escaped, but with the small majority of 28 in 578 votes cast. The result would probably have been fatal to Mr. Gladstone, if the vote had been postponed for a month. Then his government would have been held responsible for the fall of Berber and the terrible massacre that occurred there on June 3. A fourth vote might have been proposed, had not a different phase of the Egyptian trouble been forced upon Parliament for consideration before the news was received.

As always, the finances of Egypt were in a bad way. For three years the deficits of the treasury had been accumulating, till they amounted to something over £8,000,000. The indemnities for losses sustained in the bombardment, burning, and pillage of Alexandria made about half of this sum; and the expenditures for the military constituted the chief item in the remaining half. The British government desired to meet the deficit by a new loan; but, as this could not be done without conflicting with the law of liquidation, it was decided to summon to a conference those Powers that had agreed to the establishment of the law. Accordingly, on the 19th of April, Lord Granville sent an identical note to the great Powers, inviting them to a conference in London, to consider whether a modification of the laws of liquidation would not be for the financial interest of Egypt. Germany, Austria, Russia, and Italy accepted the invitation at once; but France, with something of her old-time jealousy, objected to a conference that could not consider the political as well as the financial question. Lord Granville, however, was firm in his insistance upon the limitation, so far as the conference was concerned; but he entered into a diplomatic correspondence with M. Waddington. The result of the exchange of views, or, as it was called, "the Anglo-French agreement," was submitted to Parliament by Mr. Gladstone before the conference met. France resigned all claim of control in Egypt, and agreed never to land troops in the Delta without the consent of England. On the other hand, England agreed to withdraw her military forces from Egypt before the first day of January, 1888, unless the Powers should

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

request the contrary. In the meantime she was to prepare a scheme for the neutralization of Egypt, which should be submitted to the Powers. The *Caisse de la Dette Publique*, it was agreed, should be placed under the multiple direction of the Powers. But all these arrangements, as Mr. Gladstone said, were dependent upon the will of the conference, which, in turn, should be binding upon England according as Parliament, by its votes, determined.

England being thus carefully guarded behind two big *ifs*, the Conference met in London on June 28. Its progress was slow, and as it failed of its purpose ultimately, its details need not be given. The Powers so hopelessly disagreed that the Conference was dissolved on the 2d of August. France, the leader of the opposition to England, could not secure the formulation of a future policy. As a last straw she endeavored to obtain an adjournment of the Conference till October, but, instead, it was adjourned *sine die;* and thus, all participation in the affairs of Egypt was lost to her. This was practically accomplished by her withdrawal from a joint supervision at the time of Arabi's rebellion; but now, for the first time, her position of looker-on was determined. Germany seemed satisfied with having egged on France to a point where the refusal of her demands would only increase the growing coolness between the British and French governments. Turkey, of course, had found no following in urging her rights and ability to control Egypt without the help of Eastern Powers. Italy, the only pronounced ally of England in the Conference, retired with the distinction that this alliance had brought upon her, and accepted, as her share of the "spoils" the thanks which Sir John Saville Lumley, British Minister to Italy, was instructed to bestow upon her for the support which she gave to the British proposals in the Conference.

The glory of the collapse of the Conference, if there were any, fell to England. It was demonstrated that the Powers could not control Egypt in unison; it was left to England to do the work alone and to earn the praise or the blame. The financial question remaining still unsettled, the government commis-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sioned Lord Northbrook to go to Egypt and investigate the "condition of affairs so as to advise the English government as to what counsel should be given to the Egyptian government in the present circumstances." Of course it was understood that the "counsel" would be of a more peremptory character than advice usually is; for counsel and command to the khédive have long been regarded in England as one and the same thing. The High Commission found the finances of Egypt in such a muddle that one of two courses seemed inevitable: to make a declaration of bankruptcy with a reduction of the coupons, or to turn the revenues temporarily from the sinking fund for the redemption of the certified debt into the Egyptian treasury. The latter alternative was chosen, and wisely, as it seems, although it was a breach of the law of liquidation. Lord Northbrook held that, if the tribute to Turkey and the expenses of the government could be met for a time, and if the revenues should afterward revert to the sinking fund, the couponholders would lose less than by a declaration of bankruptcy. By the decree of the khédive, September 18, the law of liquidation was suspended for six weeks. This called forth the united remonstrance of the Powers. The plan, however, was persisted in.

General Gordon, meanwhile, seemed to have dropped completely out of mind. No word had been received from him since May. By the fall of Berber telegraphic communications had been cut off, and only the vaguest rumors from any point south of Dongola made their way to Cairo. At the eleventh hour there had been a pretence of opening the route from Sûakim to Berber by sending a railway plant to Sûakim. Desultory despatches of the progress in its construction and of skirmishes with Osman Digna were received during the summer; but no one was surprised that the work was discontinued before autumn. This railway scheme was perhaps less of a farce than the Khédive Ismail's projected railway from Wady Halfa south to Hanneck; for Ismail left his plant to be covered by the sweeping sands of the Nubian desert, while the English carried theirs off to India. In order to divert attention from

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the Berber massacre, the success of Admiral Hewett's mission to King John of Abyssinia, the news of which had been received at about the same time, had been somewhat magnified. He secured, by treaty, access to a third route to Khartûm from Massowah through Abyssinia. The sequel has shown how valueless the concession was. But the attention of England had been very generally diverted from Egypt altogether. The Franchise Bill at home had been the absorbing topic during the early summer. There had, however, been many rumors afloat of an expedition to be sent to the relief of General Gordon. But the weeks had drifted by, and July, the month first named for the despatch of the expedition, was past before any active preparations were made. These were begun in August by the vote of a credit of £300,000 to defray expenses. It seemed, finally, as if the conscience of the government were quickened.

Wolseley's Expedition. Conclusion.

The command of the relief expedition was entrusted to Lord Wolseley, the Sir Garnet Wolseley who had suppressed Arabi's rebellion, and thereby won for himself elevation to the peerage. At first Lord Wolseley had been asked simply to draw up the plans of the expedition; but as General Stephenson, the commander of the forces in Egypt, had not approved the scheme, Wolseley was called upon to assume the command himself. At his suggestion the government had decided upon the Nile route in opposition to the very generally expressed advice of the most competent authorities, among whom was General Stephenson. The latter favored the route from Sûakim to Berber as the most direct and the shortest. If an advance of only ten miles a day were made, this journey could be accomplished within a month. The objections to this route were the lack of water, and the certainty that Osman Digna would dispute every inch of the way. They were formidable objections certainly, but not insuperable. The route would have been far preferable to the one decided upon, on account of the great saving in time.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

There was still another route than the one chosen that seems never to have been considered, although it has always been the beaten way from Cairo to Khartûm. It coincides with the route Wolseley preferred, except that instead of making the long journey through the horse-shoe bend of the Nile, south of Wady Halfa, where the river is impassable to large craft on account of the cataracts, it strikes off across the Nubian desert from Korosko to Abû Hamed, the points that represent the heel of the shoe. The desert journey is accomplished in about six days, the distance being two hundred and thirty miles, or somewhat less than the distance from Sûakim to Berber. The route is not altogether pleasant, as the line of skeletons of men and beasts who have perished on the way testifies; but there is a well at the midway station, and a flying column could have carried enough water along with it. In spite, however, of the greater disadvantages of the circuitous route, Wolseley decided to stick to the river.

The commander arrived in Egypt on the 8th of September, and began to make elaborate and tedious preparations. His force was to consist of ten thousand men. To transport them he had determined to employ Canadian boatmen, and to use small boats similar to those he had used in a Canadian expedition which he had commanded on the Red River some years before. The boats and boatmen were not ready before the end of September, when more than a month of high water had already been lost. If the expedition had started in July, as originally suggested, even steamers of light draft might have been towed up the cataracts, which, it must be remembered, are nothing more than long stretches of whirlpools and eddies that scarcely roar or rush as they wind in and out and around the thousand and one rocky islets. After the middle of August, when the Nile began to fall, every day passed was a precious day lost.

An impulse was given to the work at the end of September. A voice from the desert was heard that had been stilled for months. It had all of its old ring. "I am awaiting the British forces," wrote Gordon, "in order to evacuate the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Egyptian garrisons." His purpose had not changed since the day he started for the Sûdan. On the 29th of September, Mr. Power's journal of events in Khartûm, from the first of May to the end of July, was given in the London *Times*. It was a thrilling story. The indignation that the following extract aroused was intense:

> Since the despatch which arrived the day before yesterday [July 29], all hope of relief by our government is at an end; so when our provisions, which we have at a stretch for two months, are eaten, we must fall; nor is there any chance, with the soldiers we have, and the great crowd of women, children, *etc.*, of our being able to cut our way through the Arabs. We have not steamers for all, and it is only from the steamers we can meet the rebels.

The two months were past: had the garrison already fallen? Early in October further news was received contained in a series of despatches sent by General Gordon to Massowah. None of them, however, bore a later date than Power's message to the *Times*. In one of them (July 31) Gordon writes:

> Reading over your telegram of the 5th May, 1884, you ask me to state cause and intention in staying at Khartûm, knowing Government means to abandon Sûdan, and in answer I say, I stay at Khartûm because Arabs have shut us up, and will not let us out.

Again and again Gordon referred in his journal to the impertinence of the above request: State your reasons! "The '*reasons*' are those horribly plucky Arabs."[1]

The immediate result of these despatches was that all eyes were turned upon Lord Wolseley. The criticism of his movements was less than the impatience at his delays. In the government's letter of instructions, dated October 8, he was informed that the primary object of his expedition was the rescue of General Gordon[2] and Colonel Stewart. He was not to go

[1] Journal, p. 53. (September 19.)

[2] Gordon's view of the relief expedition is interesting in this connection. He wrote in his journals (September 24): "I altogether *decline* the imputation that the projected expedition has come to *relieve me*. It has *come to* SAVE OUR NATIONAL HONOR *in extricating the garrisons, etc., from a position in which our action in Egypt has placed these garrisons. I was relief expedition No.* 1. *They are relief expedition No.* 2. . . . I am not the *rescued lamb*, and I will not be." The italics are his.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

farther south than Dongola, unless it became actually necessary; and, in no case, was he to proceed beyond Khartûm, not even to relieve the garrison at Sennar. Such instructions were scarcely calculated to arouse Lord Wolseley to the activity that the purpose of his expedition required. Gordon had said that he could not leave Khartûm, and yet the government talked about rescuing him at a point midway between that city and Wady Halfa. The general who had stilled the cry of "Egypt for the Egyptians" with a skill and promptness that called forth the applause of the world, seemed to have assumed now a character quite in keeping with the desires of his government. They had been slow and irresolute in all their relations with the Sûdan. Each step was taken only when the irresistible force of public opinion compelled. By keeping just behind the public demand and the necessities of the moment, the government had acted always just too late. General Gordon gives a good instance of this failing in his journals:

> Take the Tokar business: had Baker been supported, say, by 500 men, he would not have been defeated; yet, after he was defeated, you go and send a force to relieve the town. Had Baker been supported by these 500 men, he would, in all probability, have been victorious, and would have pushed on to Berber; and, once there, Berber would not have fallen. What was right to do in *March*, was right to do in *February*. We sent an expedition in March, so we ought to have sent it in February; and then the worst of it was that, Baker having been defeated, *when you did send your expedition to Tokar*, Baker's force no longer existed, and his guns resist me at Berber. It is truly deplorable, the waste of men and money, on account of our indecision.[1]

The advance of the Nile force was lamentably slow. By the 20th of November there were only 3,000 troops, out of some 16,000 in Egypt, that had passed Wady Halfa. Within the next three weeks, however, the 10,000 troops composing the expeditionary force were all south of Korosko. It seemed as though Lord Wolseley were preparing to write a book on "My Winter on the Nile." He would have had the advantage of the thousand and one tourists who have written under the above title, in that he pushed beyond the usual limit at the first cata-

[1] Gordon's Journals, p. 151. (October 8.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ract, and maintained a progress that all might envy, who have enjoyed the motionlessness of the dahabîeh. A description of a Nile journey is nothing unless it dwells upon the laziness, the idleness, the donothingness of the life.

In the meantime the news of another horror had been received from the Sûdan. On the 10th of September, General Gordon had sent Colonel Stewart down the Nile in command of an expedition against Berber. He considered it important that the rebel fortifications there should be destroyed, thus enabling Stewart to open communication with the expedition of relief, concerning whose movements Gordon was very much in the dark. It is also hinted that Gordon wished, by this method, to save the life of his brave lieutenant.[1] Before the fall of Berber he had sent down into Egypt more than six hundred soldiers and two thousand people; but this was the first attempt since then to add to the number. Stewart succeeded in demolishing the Berber fortifications, and then, with Power, the *Times* correspondent, and about forty others, he parted from the main force, which returned to Khartûm, and steamed on toward Dongola. After passing Abû Hamed — where he might have met a flying column from Korosko if that route had only been selected — his steamer struck a rock and could not be shoved off. He and his companions were now induced by promises of peace to accept the hospitality of Suleiman Wad Gamr, in whose country they were. Unarmed, they met him at the house of a blind man to negotiate for the purchase of camels to take them to Dongola; but, while there, they were basely set upon and murdered. The bodies of Stewart and Power, the only Englishmen besides Gordon south of Dongola, were thrown into the river as food for the crocodiles. The valuable journals of Gordon and Stewart fell into the hands of the rebels. Hussein, the stoker of the steamer, escaped death, and after a servitude of four months gave the first authoritative report of the massacre. Undoubted rumors, however, had reached the force advancing up the Nile early in October. The news added fresh fuel to the fire of English indignation. The government that

[1] A. Egmont Hake, The Story of Chinese Gordon, p. 180.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

had shielded itself from the responsibility of Hicks's death could find no way of escape from the blame that now attached to it. Stewart had been appointed Gordon's first lieutenant, had been sent to the Sûdan for a specific purpose, and had then been abandoned to the fate that befell him. Those who had been wondering if the last act of the play were to be comedy or tragedy, questioned no longer. Alarming rumors were now circulated regarding Gordon. It was said that he had been captured by the Mahdi; then that Khartûm had fallen; and again that the mines had been exploded and had blown Gordon into the air. On the 14th of November, however, Wolseley received from Gordon a set of cipher despatches, dated November 4. Gordon lived; but he was in imminent danger. The Mahdi was within eight hours of Khartûm, which had provisions for about forty days. Five steamers had gone from Khartûm to Metemneh to await the expected relief. These facts were kept from the public, which only knew that Gordon was alive.

The beginning of the new year found Lord Wolseley still working his tedious way up the Nile. The apathy that had followed long-continued impatience in England was dispelled, early in January, by a very explicit telegram from Lord Wolseley to the Prince of Wales. His lordship announced, with something of a theatrical air, that he would enter Khartûm on the 24th of January. The public confidence in Wolseley's promises was great; for he had always had a way of announcing what he proposed to accomplish on a certain day, and of proceeding forthwith to carry out his undertaking to the letter. Since the battle of Tel el Kebir, however, the public had been deluded by so many vain plans, never carried to their execution, that almost any promise must need go begging for confidence. Still the general public was willing to trust for a last time, and the recent article in the London *Times* was forgotten, that called upon Mr. Gladstone to resign "in order to enable a new ministry, not crippled by personal engagements injurious to the true interests of England, to adopt a vigorous policy in Egypt, the colonies, and foreign affairs generally."[1]

[1] *The Times*, January 5, 1885.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

While Wolseley was hurrying his troops forward to Korti, which he had determined to make his base of operations, there were perplexing rumors afloat concerning the re-entrance of the Sublime Porte as an active factor in the Egyptian question. The announcement soon followed that the sultan was preparing to despatch troops to Sûakim in order to overcome Osman Digna, who was still zealously serving the Mahdi in that locality. Her Majesty's government at once resolved that Turkish troops should not be landed on the Red Sea littoral. But on what ground could England prevent it? It had never claimed the power of a protectorate; how, then, could it exercise such power? The answer was easily found in the history of the preceding years. The British government had never hesitated to act as the dominant power; it had only hesitated to assume the responsibility that must necessarily be associated with that power. It seemed now as if England would be forced finally to acknowledge herself the positive protector of Egypt, when suddenly the attention of the government and the people was diverted from diplomacy to the war operations in the Sûdan.

Having concentrated his forces at Korti, Lord Wolseley, on the 4th of January, ordered General Earle, with a force of about 2,500 men, to proceed to Berber, by way of the long bend in the Nile. He was to get possession of Abû Hamed and Berber, in order that the desert routes from those points might be made use of in case of evacuation. On the 8th of January, General Stewart, with a picked force of about 1,500 men, was despatched from Korti straight across the desert to Metemneh, there to meet the steamers that General Gordon had sent out from Khartûm. This desert rout was only about thirty miles shorter than the one from Korosko to Abû Hamed, which might have been taken in September. Four precious months would thus have been saved. All went well with General Stewart's desert journey, till he neared the wells of Abû Klea, less than twenty-five miles from Metemneh. He encamped near them on the 16th of January, and on the 17th his force was attacked by 10,000 rebels. His troops fought as Englishmen always fight; and the rebels, with all their superiority of numbers, were repulsed. The

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

English loss was sixty-five killed and nearly a hundred wounded. Among the former was the famous Colonel Burnaby, who made the wonderful "Ride to Khiva." He is said to have died "like a true British bull-dog, with his right hand clenched in death about the throat of the Arab whose spear was thrust through the Colonel's neck." On the 10th, a still more formidable force was encountered; but again the rebels were repulsed. General Stewart had received a wound which he would not admit was serious, but pushed on to Gûbat on the Nile, not attempting to force Metemneh, which was in the hands of the rebels. At Gûbat were Gordon's steamers and the inspiring message: "All right at Khartûm. Can hold out for years." It seemed as if fortune served the will of England. The enthusiasm that greeted the news of Stewart's victories and of Gordon's message was boundless. A confidence was begotten that made final success seem already within England's grasp. The world did not know then, as we do now, that the message was written for the enemy,[1] and that Gordon had sent word to Wolseley nearly two months before that he had provisions enough for about forty days. The Commander-in-Chief had received a later despatch, dated December 14, in which Gordon said: "Our troops in Khartûm are suffering from lack of provisions. . . . We want you to come quickly." But Wolseley had kept Gordon's peril a secret, only using the utmost haste — at the eleventh hour — to secure his release. The world, therefore, rejoiced at the news.

Several days were now fatally misspent. It was not till the 24th of January that Sir Charles Wilson started on Gordon's steamers for Khartûm. On the 28th, after having been assailed all along his journey by armed Arabs on the banks of the river, Colonel Wilson appeared in sight of Khartûm. Instead of the eager welcome he expected, he was met with a furious fusilade from all sides, and before him on the government house floated the Mahdi's colors. Khartûm had fallen, and Gordon was captured or killed. Assured of the terrible disaster, Wilson hastily beat a retreat. He lost both his steamers at the sixth cataract, and only reached Gûbat after a most perilous adventure, being

[1] A. Egmont Hake, Story of Chinese Gordon, p. 200.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

rescued from his dangerous situation by Lord Charles Beresford. But on the way down he had learned from the natives that Khartûm had fallen on the 26th. Gordon had been lost by two days. With fateful instinct he had written, October 13: "It is, of course, on the cards that Khartûm is taken under the nose of the expeditionary force, which will be *just too late.*"[1] It probably never will be known just how he died; and it matters little which story we believe. All agree that Faraz Pasha treacherously betrayed the city and that the martyr died like a hero.

To the western world the news of the fall of Khartûm was like a thunderbolt from a clear sky. At the very moment of rejoicing, fortune and faith were crushed. The calamity marked an epoch. The press and the people demanded that from that day the great statesman, whose policy had always been peace, should bear the arms he was loath to assume and slow to use in a strong and swift campaign of revenge, or make way for a ministry of war. The public patience and forbearance were strained beyond their utmost tension. The final catastrophe was the natural outcome of all the mistakes of England in Egypt. Since the suppression of Arabi's rebellion there had been little to admire in the British policy. Forced to remain and protect her own interests, and guard with jealous care the water-way to India, England hesitated to accept, and endeavored to shirk at every step, the responsibility that her power and position had forced upon her. It may be true that the British interference in Egypt was not of Mr. Gladstone's choosing; but, when he accepted the control of the government, he accepted the situation in Egypt as it was, and not as he might wish it to be. Since his accession, in 1880, it had never been possible or desirable for England to withdraw her influence from Egypt; but Mr. Gladstone could not look that fact in the face. After Arabi's downfall, in 1882, the British Parliament, press, and public urged their government to declare its policy or intentions in Egypt; but they urged in vain. Nothing was ever decided till the exigencies or the disasters of the moment rendered ac-

[1] Journals, p. 178.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion absolutely imperative. This halting policy had resulted in disaster, slaughter, and the final tragedy.

Scarcely had the world recovered from the first great shock of Gordon's death, when it was announced that General Earle had been killed in an engagement with the rebels, February 9, while pressing toward Abû Hamed; and then came the sad news that General Stewart's wound had proved fatal, February 16. Perhaps Wolseley began to have some concern for his own life. At all events, he lost no time in gathering together the outlying portions of his army. The perilous desert journey from Gûbat to Korti was safely made; and the river expedition that General Earle had commanded, was recalled. With all possible expedition the army retreated to Dongola, where it took up its quarters for the summer. Such was the end of the lamentable failure to rescue Gordon.

The cry for vengeance with which England was still ringing had to be recognized in some way. To counteract the humiliation of Wolseley's retreat, active operations had been undertaken on the Red Sea littoral. Troops were personally reviewed by the queen, and then ordered to the seat of war in the eastern Sûdan. It was declared that the government had determined to open the route to Berber and then to "smash" the Mahdi. But the most barren, desolate, and difficult of desert routes was still guarded by Osman Digna, the lieutenant of the Mahdi, whose forces had more than once carried destruction into the English camp. It was a difficult task the government set the English soldiers, to accomplish that journey of two hundred and fifty miles amid all the natural perils of the desert and with hostile hordes ready to swoop down upon them from every mountain along the way. But the accomplishment was beyond the intention of the government. A show of activity was made at Sûakim with soldiers and railway plant, until Mr. Gladstone had recovered from the effect of the vote of censure that so nearly[1] cost him his government when Parliament reassembled at the end of February. The beleaguered gar-

[1] The vote was carried in the upper House by a large majority, but lost in the lower House by the narrow majority of fourteen.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

rison of Kassala was sending piteous appeals for help that were like the old cries from Khartûm. But aside from this the call for war was still inspired of vengeance only. Vengeance, however, is a quality that Mr. Gladstone's character — to his honor, be it said — has never known. Supported by a narrow majority, he turned his thoughts from the stinging failures of his policy abroad to the grand purposes of his life-work at home. The cry for vengeance never found an echo in the sand hills of the desert, while at home it had dwindled, within two months, to the murmur of a jeering and deriding opposition.

The epilogue of the tragedy, however, might better have been spoken after a farce. All the irony of an eighteenth century comedy was contained in Lord Wolseley's farewell address, in which he announced the withdrawal of the British troops from the Sûdan and highly praised "the conduct of all the departments of the service during the campaign." One asks to whom and to what he issued the farewell. Was it to the shades of Hicks Pasha, of the Stewarts, of Earle, of Gordon, and of the brave British soldiers whose whitening bones would make the desert paths plainer to the caravans of war or peace that should thereafter wind across the sands of the Sûdan? Or was it to the rival Mahdis — for since the death of Gordon the glory of Mehemet Ahmed had been dimmed by the claims of a Falser Prophet than himself — who were threatening a greater destruction among believers than had been accomplished by the trained troops of a superior civilization? Perhaps Osman Digna heard the address, or from the hills about Sûakim, where he and his band had so successfully harassed and hindered the invaders, watched the withdrawal. He must have smiled — for he was a European, and cannot be supposed to have acquired the disposition of the Mussulmans with their faith — as he looked down upon the few miles of the incomplete and deserted railway.

And yet the withdrawal from the Sûdan in May, 1885, was the wisest act of Mr. Gladstone's Sûdanese policy. Gordon himself had said: "If Khartûm falls, then go quietly back to Cairo, for you will only lose men and spend money uselessly in carrying on the campaign."[1] The troops could not go as far

[1] Journals, p. 179. (October 13.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

as Cairo, however, for the Egyptian boundary needed to be guarded. The frontier garrison was placed at Wady Halfa. This was the proper limit; for it brought Korosko, the terminus of the desert route, under the protection of the Nile patrol of steamers, and was itself within easy reach of reinforcements from Assûan. The natural barriers of protection, the long cataract south of Wady Halfa, and the six days' desert guarding Korosko, make the present Egyptian garrisons practically impregnable. And so the Sûdan was left to its inherent anarchy. But first England offered naïvely to let Turkey set up a government there. Turkey declined with thanks. The Sûdan pays no tribute. The Porte cares little for the mere honor of being acknowledged suzerain; its solicitude is for something more tangible. So long as there is no interference with her tribute prerogatives, Turkey will make no attempts to establish her claim of authority, by sending troops or treasure to Egypt or the Sûdan. After Turkey refused to act the part of what seemed cat's paw to England, Italy became clamorous for the distinction. But her ambition never has extended beyond the Red Sea littoral. The Sûdanese have thus been left practically to themselves since May, 1885. They have begun to prepare their country for the ultimate reception of civilization much more effectually than an external force could have done. The Mahdi and Osman Digna are dead. Intestine strifes among different factions have so wasted the resources of the land that the misery of the people is as great, probably, or greater than in the days when an Egyptian pasha was governor-general. Perhaps the people already look back upon the time when Gordon first ruled them, as the period of their happiest prosperity. It is not an impossibility that the dreams of Sir Samuel Baker may yet come true, in which he pictures to himself the upper Nile region as freed from the curse of the slave-traffic, as accessible to the outer world, and as bringing forth the bounties of tropical increase. Before this utopian result is secured, however, the influence of the Anglo-Saxon will again be needed.

We must now take a final look at Egypt proper. The khédive's government played a small part in the game that cost

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

England so dearly. Their chief concern was to keep their head above the ever-flowing, never-ebbing tide of debts. It cannot be said that they succeeded. It has been seen to what extremities Lord Northbrook was obliged to go in order to relieve the financial embarrassments of 1884, and now the Powers were incensed at his action. By way of conciliation, a financial scheme was drawn up to which the Powers, in International Convention, agreed, and which was presented to Parliament in March, 1885. The agreement guaranteed a loan of £9,000,000, to be used in lifting the Egyptian debt, the loan to be liquidated by the repayment of £325,000 annually, and this sum to be considered the first charge against the Egyptian revenues until the entire loan is lifted. The administrative expenditure of the khédive's government was limited to the sum of £5,237,000. Any surplus over the year's receipts was to be paid over to the Commissioners of the Public Debt for the purpose of making good an imposed deduction of five per cent from the interest on the loan and an imposed reduction of one-half per cent from the interest on the Suez canal shares held by England. The customary provision was included in the agreement, that extends taxation to all foreigners resident in Egypt. This provision had often enough been endorsed; it must now be executed. The Egyptians would then believe that the Giaours were not without a sense of honor. The agreement further provided, as always, for an "exhaustive investigation into the revenue-earning capacity of Egypt." The final provision of importance was that if at the end of two years it should be found that a continued deduction from interest on the coupons is necessary, the khédive should summon an international commission like that of 1880, to make general inquiry into Egyptian finances. The agreement seemed to have been drawn up in the interest of Egypt.

The two years of probation are nearly ended. In the interval Egypt has prospered and the financial scheme has worked well. The Commissioners of the Public Debt now announce[1] that the surplus after the payment of the November coupon of the

[1] *The London Times*, October 26, 1886.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

unified debt "will suffice to make good any deficiency in the unassigned revenues and to reimburse the five per cent coupon tax levied during the last two years, besides leaving a balance, which under the convention will be equally divided between the *Caisse* and the Ministry of Finance." There will thus be no occasion for the khédive to summon an international commission. The comparative prosperity that has secured this result is due to the peaceful state of affairs in Egypt and to the more than ordinarily productive yield of the soil. The cotton crop has of late recalled the days when Ismail was khédive. Then, too, there has been a discovery within the boundaries of Egypt that may afford a better solution of the financial problem than all the agreements and investigations of European Powers can ever secure. Egypt has been absolutely unproductive of fuel; but there is a promise that the newly found petroleum will be made to answer the purposes of the imported coal. The new fuel has already been introduced by way of experiment on the Alexandria and Cairo railway.

There is one step remaining to be taken in Egypt that will do more than anything else toward securing the final settlement of the conflict between East and West. England must assume the burdens of her authority. She can never loose her hold of the country that guards the waterway to India. She is jealous of her power. When her attention was concentrated on the Afghan imbroglio in May, 1885, France thought it an opportune moment to regain her lost prestige in Egypt. But if England's attention was diverted for the moment, her representatives were not without power in Egypt. M. de Freycinet failed as utterly then as he did in the day of Arabi. The complications that have arisen lately over the Bulgarian troubles have again pushed France to the front as the opponent of English domination in Egypt. Russia, of course, with her grasp upon Bulgaria and her eye ever on the Bosphorus, is inciting France to this opposition. The French press is filled with stories of the misrule that is prevalent in Egypt. But France will circulate stories reflecting on the policy of England in Egypt until she forgets the circumstances of her own retire-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ment from responsibility. England has the single-handed control, and she means to maintain it. The welfare of Egypt rests on this resolution. Many people, who claim the divine right of judging the motives of an action and who fail to see so far as its results, urge that England is actuated solely by selfishness and the greed of power in asserting her control in Egypt, and that she is merely fortifying herself against that certain day when some protruding arm of Russian territory shall reach a southern sea. They say she makes the interest of Egypt secondary to her own; therefore, the power of England in Egypt must be resisted. Granting even that these are England's motives, cannot the same wind blow good to both countries? Is it a sound principle that what benefits one country must injure another? The fact is, that the extension of the dominion of Great Britain, while bringing glory to the nation itself, is for the interest of the civilized world. The Anglo-Saxon influences of Christianity and civilization are the best known. As opposed to Russian influences they are both iconoclastic and creative. The Russian empire extends its dominion, and there appears no sign of assimilation; the subjugated people pays its tribute and its homage, but retains its language, its religion, and its customs. England, on the other hand, makes her furthermost territory British in reality as well as in name; ignorance, superstition, and savagery melt away under contact with the Anglo-Saxon influence. That England, in spite of all her mistakes, has had a beneficent influence upon Egypt, no one can doubt who compares the civilization under Mehemet Ali with that of to-day. This would be the trite assertion of an accepted fact, were it not for the stupendous financial follies of Ismail. The storm raged in his day; and the gloom still hangs over Egypt. It can only be swept away by the protecting arm of England. She has shrunk all along from the final step of annexation; but she remains the virtual suzerain of Egypt. A truly anomalous condition of affairs is presented to view. England has the control; Egypt bears the burdens; and Turkey reaps the profit. The rôle of Turkey is quite superfluous. She has never yielded to Egypt the slightest return for the tribute she has regularly

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

exacted and the troops she has occasionally employed. It is true that she granted Ismail the title of khédive for an enormous consideration; but if Mehemet Ali had been supported in his just struggle for independence in 1842, the ruler in Egypt might call himself khédive, emperor, or mikado, without the expenditure of a single piaster. It is not yet too late for severance. The vast sum of money paid by way of tribute to the Porte may be considered duly to have purchased for Egypt her independence of Turkey. This violation of contract could not be effected without a struggle. But with England's support it could result only in one way. Once accomplished, Egypt might yet shake off the shackles of debt, and the relations of the great Power of the West to Egypt in the East might be settled without conflict.

JOHN ELIOT BOWEN.

BOOKS AND PERIODICALS CONSULTED.

ABOUT, EDMOND. The Fellah.
ALLEN, CHARLES H., F.R.G.S. The Life of Chinese Gordon.
BAKER, Sir SAMUEL W. Ismailia.
BROADLEY, C. M. How we Defended Arabi.
DICEY, EDWARD. The Morning Land.
FORBES, ARCHIBALD. Chinese Gordon. Succinct Record of his Life.
GLADSTONE, W. E. Speech on Egypt and the Sûdan.
GOODRICH, Lieutenant-Commander CASPER F. (U. S. Navy.) Report of the British Naval and Military Operations in Egypt, 1882.
GORDON, General C. G. Journals at Khartûm.
GRANT, ROBERT. History of the East India Company.
HAKE, A. EGMONT. The Story of Chinese Gordon.
JERROLD, BLANCHARD. Egypt under Ismail Pasha.
—— The Belgium of the East.
KEAY, J. SEYMOUR. Spoiling the Egyptians. A Tale of Shame told from the British Blue Books.
LEON, EDWARD DE. The Khédive's Egypt.
LESSEPS, FERDINAND DE. The Suez Canal. Letters and Documents Descriptive of its Rise and Progress, 1854 to 1856.
LONG, Colonel C. CHAILLÉ. The Three Prophets: Chinese Gordon, Mehemet Ahmed, Arabi Pasha.
LORING, W. W. A Confederate Soldier in Egypt.
MCCARTHY, JUSTIN H., M.P. England under Gladstone, 1880–1885.
MCCOAN, J. C. Egypt As It Is.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

PATTON, A. A., F.R.G.S. A History of the Egyptian Revolution to the Death of Mehemet Ali.
PEPPER, J. H. The Suez Canal. Published in Routledge's Discoveries and Inventions of the Nineteenth Century.
STONE, FANNY. Diary of an American Girl in Cairo during the War of 1882. *The Century*, June, 1884.
STONE, WILLIAM, M.A., F.L.S. Shall we Annex Egypt?
TOWLE, GEORGE MAKEPEACE. England in Egypt.
WALLACE, D. MACKENZIE. Egypt and the Egyptian Question.
WILSON, C. T., and FELKIN, R. W. Uganda and the Egyptian Sûdan.
YATES, WILLIAM HOLT, M.D. The Modern History and Condition of Egypt, 1801 to 1843.
Anonymous. Egypt for the Egyptians: a Retrospect and a Prospect.
—— Plain Words on the Egyptian Question.

Appleton's Annual Cyclopædia has been of use, and files of the following journals have been consulted:

The British Quarterly Review.
The Contemporary Review.
The Edinburgh Review.
The Fortnightly Review.
The Independent.
The London Times.
The Nineteenth Century.
The Quarterly Review.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

REVIEWS.

Seventeen Lectures on the Study of Medieval and Modern History [*etc.*]. By WILLIAM STUBBS, D.D. Oxford, 1886. — 8vo, vi, 399 pp.

The Methods of Historical Study [*etc.*]. By EDWARD A. FREEMAN, D.C.L. Macmillan & Co., 1886. — 8vo, vi, 335 pp.

When Dr. Stubbs was made Bishop of Chester, Oxford was singularly fortunate in being able to command the services of so able a man to succeed him as Dr. Freeman. The books which we are noticing represent a part of the work done by each in the Regius Professorship of Modern History. While Dr. Freeman acknowledges a great debt of learning to his predecessor, it would not be proper to overlook the fact that no Englishman can write intelligently on modern history at all, without himself being indebted to the author of the "Norman Conquest."

What strikes one very forcibly in these lectures is the emphasis laid by both writers on the importance of historical method. Whether it be from the scarcity of thoroughly equipped libraries in this country, or from a lack of men to pursue advanced historical study, it is a fact that in most of our universities, the methodology of history has been a neglected branch in the curriculum. Even in the English universities, the subject is not presented with anything like the fulness and thoroughness which one finds in German seats of learning. But Dr. Stubbs is hardly warranted in intimating that "the earlier English history has not received its share of attention in the United States" (page 70), although he adds that "American acuteness and industry are applying themselves to this region in which they will find so much to profit both themselves and us."

Dr. Stubbs' introductory lectures are full of valuable suggestions as to the way in which history should be studied, and as to the literature which is useful to the student. There are four lectures of this kind in addition to the inaugural. They treat of the present state and prospects of historical study, of the purposes of historical study, and of the methods of historical study. It would be difficult to exaggerate the value of suggestions on these subjects, coming as they do from so experienced a workman.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The remaining lectures are devoted to subjects which illustrate the author's recommendation that history should be studied for its own sake. We do not have to traverse any old and well-worn path. We do not have to watch the process by means of which results are reached. The scaffolding has been taken away before the building is shown. Considering how much misunderstood the middle ages still continue to be, even by scientific men, writers like Dr. Stubbs can hardly tell us too much of this important period. Men travel so constantly in the "ruts" of preconceived tradition that they need to have reiterated impartial opinions which may have long since superseded old prejudices. Here is a familiar instance:

> The Crusades are not in my mind either the popular delusions that our cheap literature has determined them to be, nor papal conspiracies against kings and peoples, as they appear to the Protestant controversialist, nor the savage outbreaks of expiring barbarism thirsting for blood and plunder, nor volcanic explosions of religious intolerance. I believe them to have been in their deep sources, and in the minds of their best champions, and in the main tendency of their results, capable of ample justification. They were the first great effort of medieval life to go beyond the pursuit of selfish and isolated ambitions. . . . [Page 157.]

It is to throw a new light on this great eastward movement of mediæval Europe, that the author devotes a lecture on "The Medieval Kingdoms of Cyprus and Armenia," at the close of which he dwells thoughtfully and eloquently on the condition of the eastern provinces of Europe, and seems to look with a not very hopeful eye on the regeneration of the Mahometan world. The two following lectures review in an interesting manner the differences between the mediæval and modern history.

We doubt whether the character of scholasticism is so accurately apprehended by Dr. Stubbs, as is the character of the literature and politics of the middle ages. The term "scholastic" philosophy is not univocal, but we cannot find any justification for the author's account of the nature and development of mediæval philosophy. On the other hand, he treats in an able and original way the influence on the balance of power in Europe of the various changes in thought and politics during the middle ages, which reached a climax in the Reformation. Two lectures are given to Henry VIII. and his Parliament, two to the reign of Henry VII., and two to the history of the canon law in England, all of which require more special notice than we have space to give. The lecture which treats of the character of Henry VIII. is well worthy of attention. Dr. Stubbs' estimate of that monarch's nature and disposition is impartial, and on some points quite new.

Far more interesting to the general reader than the lectures just

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

noticed will be Dr. Freeman's course delivered in the same professorship. Those who are familiar with his writings know that although he is sometimes dull, he can be eloquent, and his inaugural is in his best style. The entire book abounds in what one may describe without disrespect as Freemanisms. But if any one has it in his mind to make an excursion for the first time into the field of history, and especially if any one intends to undertake the more difficult task for writing history, Dr. Freeman's lectures furnish a most valuable preparation. Here we have, beside a general discussion of the subject, a treatment of the difficulties of historical study, the nature of historical evidence, original authorities, classical and mediæval writers, subsidiary authorities, modern writers, geography and travel.

While Dr. Freeman emphasizes the importance of studying history from original authorities, he points out the advantage of not passing over men "of a generation or two back." His recommendation of himself is certainly far too modest. "Speaking myself as a superseded fossil, I cannot altogether keep down my fellow-feelings for the superseded fossils that were before me. If we are good for nothing else, we are at least good for the history of opinion." [Page 295.]

ARCHIBALD ALEXANDER.

Finanzwissenschaft. Von ADOLPH WAGNER. *Dritter Theil: Specielle Steuerlehre. Erster Heft: Steuergeschichte.* Leipzig, C. F. Winter'sche Verlagshandlung, 1886. — 8vo, 208 pp.

Those who are familiar with Professor Wagner's literary methods will not be surprised to learn that his *Lehrbuch der Politischen Oekonomie* is as far from completion as ever. Of the "Principles" of political economy, or *Grundlegung*, only one volume out of two has appeared; and of the *Finanzwissenchaft*, originally promised in two volumes, the second appeared only to announce that a third would be necessary, and now the first instalment of the third announces that there is to be still a fourth. Furthermore, the learned author announces that he has changed the arrangement of the whole work, so that only the third edition of the first volume will be of use, and a new edition of the second volume will be necessary.

Of course, a treatise on finance, filling four volumes of over 700 pages each, can be nothing more nor less than an encyclopædia. It loses the character of a text-book, while at the same time its movement is so slow and heavy that it cannot be of general or popular interest. In his first two volumes, Professor Wagner treated of the general theory of finance,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the expenditures of the state, and of the revenue of the state. Under the last head he had an *Allgemeine Steuerlehre*, which covers the entire field of taxation. Now, however, we are to have a *Specielle Steuerlehre*, which is to be historical, descriptive, and statistical; and finally, we are to have a *Steuersystem*, which will treat each tax by itself. The objection to such an elaborate scheme is that it goes over the ground three or four times, but each time in a more or less superficial way. The beginning of this third volume brings out strongly the weakness of the method. The author has already given a sketch of the development of taxation in Europe as part of his general theory. Now he gives the history of taxation in Greece, in Rome, in the Frankish Empire, and in England, Germany, and France, down to the beginning of the nineteenth century. Such a history in two hundred pages remains still, of necessity, merely a sketch. It is necessarily, also, second-hand. It is simply a *résumé* of the best histories of taxation in each country; for instance, in the case of England, he rests entirely on Gneist and Dowell. Perhaps it seems necessary to the German spirit that a *Gelehrter* should thus turn a scientific treatise into a badly-arranged encyclopædia, but from our point of view it is very much to be regretted. It injures the work as a systematic treatise by making it so voluminous, while it adds nothing to our knowledge.

A second instalment of this third volume is to follow immediately, and the second edition of the second volume is already under way.

R. M. S.

Les solutions démocratiques de la question des impôts. Conferences faites à l'École des sciences politiques. Par M. Léon Say, membre de l'Institut, sénateur. Paris, Guillaumin et Cie, 1886. — 2 vols., 12mo, 260 and 299 pp.

There is no doubt that the most ingenious, and at the same time most dangerous, part of modern socialistic schemes is the proposal to make use of the power of taxation in order to correct the inequalities of wealth. For instance, Henry George's plan is not to abolish private property in land, but simply to tax it up to its full rental value, thereby relieving the community of all taxation, and using the excess for purposes of general public utility.

The purpose of the two little volumes before us is to examine this new socialistic finance, to describe what progress the tendency has made in the different states of Europe, to criticise the justice of the fundamental idea, and to indicate what would be the economic and political

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

consequences if it were carried into effect. The standpoint of the distinguished author is avowedly that of the orthodox political economy and the ancient liberalism. He proclaims himself to be a disciple of Adam Smith and of J. B. Say. He believes that the functions of the state should be limited as much as possible; that its expenses should be decreased; that taxation is a return for services rendered, and should be in proportion to ability, while at the same time the taxation of savings and productive capital should be avoided. Socialists, on the other hand, desire the extension of the functions of the state, taxation in proportion to superfluities, and the use of the taxing power for the purpose of transferring wealth from one class to another.

The practical means of realizing this socialistic programme lie in the abolition of indirect taxes and the introduction of a direct personal tax, which shall fall heavier on the rich capitalist than on the poor workman; that is, a progressive income or property tax. In this last particular, the author says, a curious change has come about in the feelings of advanced democracy during the last hundred years. At the time of the French Revolution it sought the abolition of the direct tax on persons because it was arbitrary and unjust. The democratic idea of justice at that time was equality. Now the idea of justice, in the mind of advanced democracy, is taking from the rich in order to give to the poor. Hence it favors the restoration of the personal tax.

This socialistic movement, according to the author, is more or less apparent in the financial systems of the different states of Europe. In France, the revolutionary assemblies did away with the arbitrary personal taxes, substituting therefor a variety of taxes on property, such as the land-tax, the building-tax, the license tax on commercial enterprises, *etc.*, levying these generally in proportion to ability, and avoiding too close inquisition into the affairs of the individual. In England, the income tax might easily be modified into a personal tax on different classes, and is, in fact, slightly progressive, owing to the exemption of small incomes; but the English income tax has always remained a real proportional property tax because of the refusal of Mr. Gladstone to make even such exceptions as strict justice demands. In Italy, the tax on personal property has been arranged to meet the supposed circumstances of different classes, and is losing its character of a property tax and becoming a personal tax. In Germany, the recent modifications of the class and income tax, with special exemptions and special additional impositions on funded capital, lead still further in the same direction; while the tendency reaches its fullest expression in certain Swiss cantons, especially Zurich, with its progressive property tax. This comparison of the property and income taxes in the different countries is altogether admirable.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

M. Léon Say's criticism of the movement is keen and close. He not only vigorously defends the orthodox liberal conception, that civilization rests on the energy and character of the individual, against the vague socialistic notion of a state out of which everybody can make something, but he shows the practical difficulties in the way of realizing the financial proposals. It is impossible to abolish indirect taxes. We cannot do without them. In most countries the central or federal government is almost entirely dependent upon them, because the direct taxes are absorbed by the local authorities. Besides, indirect taxes are not really unpopular with the people, as witness the readiness with which they submit to enormous imposts on alcohol and tobacco, and the ease with which they are won for protective systems, which all result in indirect taxes. Again, the progressive income or property tax has never been productive. If the progression is moderate, it yields but a slightly increased return; if it is rapid, it is evaded, and cannot be collected. Besides, it leads to grave political dangers by inciting the poor to plunder the rich.

The conclusion is that our present system of taxation may need modifications, in order to correct inequalities and hardships, but it can never be accepted as a principle of finance that the object of taxation is to transfer wealth from one class to another.

RICHMOND M. SMITH.

The Labor Movement in America. By RICHARD T. ELY, Ph.D., Associate in Political Economy in Johns Hopkins University; Author of *French and German Socialism, The Past and Present of Political Economy, etc.* New York, Thomas Y. Crowell & Co., 1886. — 8vo, xiii, 373 pp.

It has been something of a reproach to our literature that most of the extended accounts of the labor movement in the United States have appeared in a foreign language. Dr. Ely has rescued us from this reproach, and deserves credit for having brought together, within the compass of one book, a description of all the principal movements that have been made in this country towards the amelioration of the condition of the wage-receiving classes.

The work begins with a description of the old-fashioned communistic societies of the United States, such as the Shakers, the Perfectionists, *etc.* The topic is already familiar to the public through the works of Nordhoff and Noyes, but Dr. Ely has supplemented their investigations by independent researches of his own. The book then speaks of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

origin and growth of labor organizations in the United States. The first part of their history, say from the beginning of the century down to 1850, has always been a *terra incognita* of economists. Dr. Ely has added somewhat to our knowledge of this epoch, though not so much as to forestall future investigators. The years since 1850 are treated with more detail, and an account is given, in this part of the book, of the great national and international trades-unions of the present day.

This is followed by three chapters on various aspects of labor organizations. A chapter is then devoted to the history of co-operation in this country, and five to socialism and internationalism. The work concludes with a chapter entitled "Remedies," in which Dr. Ely prudently says that he does not present a scheme of social regeneration, but merely offers a few hints which may be useful to the reader. The four agencies upon which he relies for the amelioration of the condition of the laboring classes are the labor organization, the school, the state, and the church. He seems to lay the principal stress, in common with the Christian Socialists of Germany, upon the general diffusion of the principles of Christianity, though he does not explain on what he relies for this diffusion, in the face of the pronounced antagonism of so many of the leaders of the labor movement towards the church.

Dr. Ely has presented in his book a great deal of valuable information, and will undoubtedly do a service by enlightening many of those whose knowledge of labor organizations and socialism is confined to their excesses. It is somewhat unfortunate, therefore, that in many of the discussions the author seems to have given the arguments in favor of the various phases of the labor movement from the point of view of those engaged in it, rather than to have supplied an impartial criticism from the point of view of the economist.

Dr. Ely's whole view of the character and aims of the labor organizations is so optimistic as to be misleading. He says, for instance, on page 78, in speaking of the principles of the Knights of Labor: "It is thus that they put themselves in line with the precepts of Christianity. The strong help to bear the infirmities of the weak, and no grander conception of human brotherhood than that which they profess, characterizes any movement of our times." Again, on page 138, he says: "The labor movement, as the facts would indicate, is the strongest force outside of the Christian church, making for the practical recognition of human brotherhood." It seems hardly credible that a student of social phenomena should have overlooked the fact that, as the family itself is one of the most exclusive of institutions, so the use of the terms "brother" and "sister" in labor organizations has generally implied

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

exclusiveness rather than human brotherhood. The very closeness and intimacy of the tie that exists between the members of a well-drilled trades-union finds its counterpart in their hatred and contempt of those who stand without the pale. Dr. Ely himself must be aware that such persons are stigmatized as "scabs" and "rats," and that the unions, in many cases, have had no compunctions in depriving them, if possible, of their means of livelihood. Trades-unions have many merits, but it cannot be claimed as one of them that they are working in the direction of human brotherhood.

In another place, page 75, he says: "Although the origin of the Knights of Labor was thus humble, it was established on truly scientific principles, which involved either an intuitive perception of the nature of industrial progress, or a wonderful acquaintance with the laws of economic society." Without disparaging the merits of this great society, one may be pardoned for asking whether such unlimited praise is not at least a little premature. To say that a society is founded on scientific principles is the highest praise that a scientific man can bestow. In view of the killing of engines, the destruction of property, and the virulent persecution of "scabs," which the Knights of Labor were carrying on at the very time at which Dr. Ely must have been writing his book, is it unfair to expect him to explain what particular science has lent its principles to the establishment of this order? To many people the Knights of Labor seem to have furnished quite as striking an exhibition of some of the vulgar weaknesses of human nature, such as envy, hatred, and uncharitableness, as of the principles of science.

The statement made on page 114, that labor organizations have it in their power to exercise an influence upon the supply of labor in the future market, ought also to be qualified in some way; for while it is perfectly well known that by regulations regarding apprenticeships labor organizations often control the supply of labor in particular trades, it is commonly supposed that they do this at the expense of the trades which are not organized. If they are able, or if they have tried, to exercise an influence upon the general market of labor, the fact would be certainly worth explanation and emphasis.

The most surprising part of the book is that in which Dr. Ely treats of the relations between the workingmen and the police. On page 327, in speaking of the reforms demanded in our police system, he says: "What is wanted is some kind of a control which shall prevent the continual clubbing of poor people without cause"; and in his final word to workingmen he says: "It cuts me to the heart when laboring men are shot down in the street." Finally, the law passed by the Illinois legislature, in 1879, forbidding unauthorized companies of armed

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

men, is condemned in the strongest terms, and the author says that this law, "was, it may as well be acknowledged frankly, directed against workingmen. It was class legislation." (Page 327.) The significance of these passages evidently lies in what they imply more than in what they say. One must, therefore, be careful not to misinterpret the author. Yet we venture the statement that two things are plainly conveyed by them: first, that the police are in the habit of clubbing and shooting people, because they are workingmen and poor; and secondly, that it is characteristic of workingmen as such to meet for secret practice in street warfare. If that is the meaning of these passages, — and we have quoted them in full, in order to do the author no injustice, — comment is hardly necessary. It is interesting, however, to note that the charge brought against the police is no more defamatory than the imputation put upon the workingmen. If, *e.g.*, an author were to state that the laws against embezzlement were directed at capitalists, or that those against bribery were directed at statesmen, bank presidents and politicians would hardly be flattered. Yet such statements would be an exact parallel to the statement that laws made to prevent riots are aimed at workingmen.

Dr. Ely may, of course, contend that the Illinois law is inexpedient as a matter of practical administration, and that arson and murder can be best suppressed by allowing criminals every opportunity to make their preparations and by taking no action against them until the house is blazing and the shot fired. But to call laws which endeavor to prevent preparations for crime "class legislation directed against workingmen," is an abuse of terms, and of the workingmen too.

It is peculiarly unfortunate that such expressions should find their way into a book which seems to have been written with a view to its effect on the practical solution of present social problems. It is unfortunate for two reasons. If the book is intended to influence the workingmen, — and there is unmistakable evidence both in the preface and in other parts that it is, — such phrases will be very apt to encourage them in a course which it would be for their best interests to abandon, and which, it should be frankly said, Dr. Ely himself expressly condemns. If, on the other hand, the work is intended to influence the employers and those who are out of sympathy with the labor movement, such phrases will tend to destroy, or at least largely weaken, the authority of the author. Some persons have already, unjustly of course, accused him of being a socialist. Dr. Ely says — and he certainly ought to know — that he is no socialist. Yet much that he says sounds so much like what a good many of the socialists say, that he ought hardly to complain, if people occasionally mistake him for one. If a man

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

should march in a socialistic procession, bearing a red flag with the inscription "I am no socialist," he could hardly pick a quarrel with the newspapers for reporting him as a socialist. Neither should Dr. Ely complain, if the color he gives to many statements leads people to call him a socialist in spite of his emphatic protests to the contrary.

HENRY W. FARNAM.

The Philosophy of Wealth. Economic Principles newly Expounded. By JOHN B. CLARK, A.M., Professor of History and Political Science in Smith College; Lecturer on Political Economy in Amherst College. Ginn & Co., Boston, 1886.

I cannot express too warmly my appreciation of this treatise. It presents the rare excellence of fully recognizing the influence of moral forces in economic actions while at the same time maintaining the scientific spirit in the analysis of industrial processes. Its title is not misleading. From the first chapter to the last it is a scholarly discussion of the philosophy of wealth.

This discussion begins, as might be expected, with an analysis of wealth. The purpose of the author seems to be to formulate a definition sufficiently broad to include all sorts of useful things that may be bought and sold, and sufficiently accurate to avoid the necessity of admitting numberless and annoying exceptions. Mr. Mill's definition, it will be remembered, contemplated only material things as wealth, and, in consequence, compelled a classification of industrial workers into direct producers, indirect producers, and non-producers. This is avoided by the definition of Professor Clark, which permits all labor resulting in the satisfaction of felt wants to be classed as productive.

With regard to labor, the conception which finds expression in this book is very simple. Labor is "wealth-creating effort." This phrase, properly understood, may be consistently used throughout the entire domain of economic discussion. It pierces to the centre the misconception of those socialists whose merit it is logically to apply the premises provided by Ricardo, and permits the student to avoid the erroneous conclusions of Mr. Mill in his treatment of the distribution of the product.

> The human activity [says our author] which produces wealth is an activity of the entire man, physical, mental, and moral, and there is no industrial product so simple and so purely material that these three elements of human agency are not represented in it. In proportion as the intellectual element of labor predominates over the physical, and as the moral element

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

predominates over both, the products rise in the scale of respectability and value. The labor of a stone-mason involves a physical effort in the simple moving of materials, an intellectual effort in their skilful combination, and a moral effort in the conscientious use of proper material and methods. [Page 19.]

It is but a step from a study of the nature of wealth and labor to a consideration of the nature of the basis of economic laws, and the important thought in the chapter devoted to this subject springs from the conception that an increase in numbers in society must of necessity change the character of the social organism. On this matter the author expresses himself as follows:

> It is not merely man as an individual that needs to be considered. A man is not independent. So close is the relation between him and others of his race that his conduct is dictated and his nature transformed by it. . . . The solidarity of society is a primary economic fact. Political economy treats, not merely of the wealth of individuals who sustain complicated relations to each other, but of the wealth of society as an organic unit. . . . Society holds two distinct relations toward every man; it is the object of his efforts; he is the object of its efforts. . . . The social relation reacts on the nature of the individual. . . . Low organisms of every sort have few and simple wants, [but] multiplicity of wants marks the grade of society and of the individual. . . . Closely connected with the mere complication of social structure is the growth of specific vices and virtues. The isolated man had no neighbors to rob and none to serve. . . . Social relations, wants and want-satisfactions, sins and virtues, multiply in corresponding degree. Together, therefore, with mere altruism, the economic principle by which man in self-interest is led to work for others, there grows in controlling influence the higher altruism of unselfishness. Society of the highest type is not merely differentiated and cephalized. There is, indeed, in high civilization, increasing division of labor, and a progressive control of the social body by a thinking organ; but there exists, in as marked a degree, a growing subordination of brain and members to the dictates of moral law. This is the great neglected economic fact of modern times. [Pages 37 to 43.]

But Professor Clark carries further this life-giving truth, that society is an organism subject to the law of ordered change, and makes it the basis of his theory of value. For those who are acquainted with the writings of Professor Jevons there is little new in this chapter, but those who appreciate Professor Jevons will gladly see his views again brought into prominence. It is regarded as essential to an adequate presentation of this elusive subject that utility and value should be inseparably bound together in thought. "Value is quantitive measure of utility." (Page 74.) In order, therefore, to understand the process of exchanges, the attention of the student must be drawn to the nature and source of utility.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

But utility is conceived to be an attendant and not an intrinsic quality, and is consequently dependent upon the relation of commodities to the wants which they are designed to satisfy. That which seems to be new in this treatment of the subject, is a somewhat vaguely suggested classification of commodities according as they satisfy crude or developed wants; for it is observed that the law of utility, when applied to commodities serving various purposes, leads to varying results.

The question of distribution, also, receives attention, and it is properly recognized that "the problem thrust upon society is not merely how to divide a sum, but how to adjust rights and obligations." (Page 109.) Distribution is regarded as the reverse of production. As the process in the latter case is synthetic, so in the former case is it analytic. This is undoubtedly a true suggestion, but whether it will also prove to be a fruitful one, can only be determined by experiment. We can speak more confidently of the importance of the thought that the analytic process of distribution concerns itself with separating "values into a series of quantitative increments." (Page 113.) The chapter upon wages as affected by combinations is satisfactory as far as it goes, and is especially interesting because written under the guidance of the historical method of study. The proof of this is the ease with which the changes in the nature of competition, introduced by the industrial expansion of the last one hundred years, are interpreted (pages 130–140); for the historical method does not consist, as many seem to think, in an appeal to history for the support of assumed premises, — its test is rather the judicial spirit with which one enters upon the task of analysis. The best chapter of the book is the one which treats of the ethics of trade; the least satisfactory chapter is the last, which discusses the economic functions of the church. It leaves the impression of being a little fanciful and incomplete.

This review has certainly been sufficiently appreciative to have earned the privilege of a single criticism. Professor Clark's book challenges the attention of students, as a contribution to the development of systematic thought upon the subject which it treats. It should, therefore, contain an adequate number of references, either as notes or in the text, so that the reader need not be called upon to separate for himself that which is new in the treatise from that which has previously found expression. This, the author has not been careful to do. For example, the quantitative conception of wants and utilities (an idea which lies at the basis of the mathematical method in economics), the general doctrine of increments as applied to exchanges, the thought that competition can exist between commodities offered for sale, as well as between the purchasers of commodities, — these all belong, in the minds of Eng-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

lish readers, to the intellectual estate of Professor Jevons. Again, we find (page 155) an admirable presentation of the fact that competition between workingmen is at any time restricted to certain well-defined industrial groups. The reader is told that these non-competing groups should not be confused with those to which Professor Cairnes called attention, but he cannot learn from the text that this distinction was built into the structure of economic thought nearly twenty years ago by Mr. Longe. It forms one of the three indictments which he drew up against the wage-fund doctrine. The explanation of these omissions is, I think, that Professor Clark does not recognize the importance of his addition to American economic literature; and for that reason, neglects to indicate precisely the directions in which his treatise contributes to its development.

HENRY C. ADAMS.

Die nordamerikanischen Eisenbahnen in ihren wirthschaftlichen und politischen Beziehungen. Von ALFRED VON DER LEYEN. Leipzig, Veit & Co., 1885. — 8vo, 402 pp.

The Railways and the Republic. By JAMES F. HUDSON. New York, Harper & Brothers, 1886. — 8vo, 489 pp.

Das Eisenbahntarifwesen im allgemeinen und nach seiner besonderen Entwickelung in Deutschland, Oesterreich-Ungarn, der Schweiz, Italien, Frankreich, Belgien, den Niederlanden und England. Von FRANZ ULRICH. Berlin u. Leipzig, Verlag von J. Guttentag (D. Collin), 1886. — 8vo, xii, 504 pp.

An Investor's Notes on American Railroads. By JOHN SWANN, M.A., Oxon., sometime General Manager Alabama Great Southern Railroad. New York, G. P. Putnam's Sons, 1886. — 12mo, iv, 172 pp.

No one question has thrust itself to the forefront of scientific investigation and popular interest with more rapidity than the transportation problem. With each succeeding year the literature of the subject increases at an immense pace. Among the noteworthy publications of the last twelve months I have selected these four works as being of permanent value, although in greatly varying degree, to the American student.

The book of von der Leyen, on American railways in their economic and political relations, is largely made up of essays that have appeared in the *Archiv für Eisenbahnwesen*, of which he is the editor. It is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

descriptive rather than critical, and thus contains much matter that is familiar to the American reader; but it is always interesting and instructive to have our facts and institutions looked at through foreign spectacles, especially when the spectacles are worn by so eminent an expert as Herr von der Leyen. Of the ten chapters, three are devoted to history — the Camden and Amboy Railroad, the Northern Pacific, and the Standard Oil Company. This naturally gives our author ample opportunity for criticism of a rather severe nature. He emphasizes as pointedly as possible the public-use theory of railway corporations, and has words of encouragement and approval for the boards of railway commissioners, especially in Massachusetts, New Hampshire, and New York. Why, however, he should choose New Hampshire and say nothing of Georgia or Illinois, is hard to explain. His conservatism manifests itself in the introductory chapter, where, after a careful review of the defects of our system, it is decided that state-ownership would be entirely too premature and too dangerous an experiment for the United States. An interesting chapter is that devoted to competition and pooling. It is significant that what appears to many Americans a reprehensible practice should be regarded as a matter of course and a most salutary institution by a European. The explanation is not far to seek. Europe has long recognized the necessity and benefits of pooling; we are still in the first stages of the development. Von der Leyen, like all experts, has long since abandoned the faith in railroad competition, and finds in the joint executive committee an earnest of better things. In treating of our railway rates and their underlying principles (chapters 6 and 8) he is somewhat unfair, comparing the Prussian rates with those of the Northern Pacific at its very inception, whereas it is a notorious fact that American freight rates in general are lower than in Europe. Criticism might also be made of his failure to appreciate the necessity of local discriminations in certain cases — a necessity which has been repeatedly made clear by both the Hepburn and the Cullom investigations. Von der Leyen likewise takes rather too tragic a view of the influence of the railways on political demoralization. But on the whole the book is fairly and judiciously written, and contains much valuable material.

Of an entirely different character is Hudson's work on *The Railways and the Republic*. Mr. Hudson is not a friend of the railways. He exposes their shortcomings with a merciless severity, and succeeds without much difficulty in making out a most damaging case. But he falls into the error, so often committed by those that see only one side of the matter, of clutching at heroic remedies. It is easy to criticise, it is hard to reform; and we venture to say that the more one studies the railroad problem, the more timorous of drastic remedies will he become. Judged

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

from this standpoint, Mr. Hudson has evidently devoted little thorough study to the question, for the remedy he proposes is one long since attempted, long since utterly discarded. Absolutely free competition, complete assimilation of the railway to the highway, abandonment by the owners of the exclusive right of transportation, and of course the prohibition of pools, — this is the panacea. The slightest acquaintance with European economic history should have been sufficient to show the hopelessness, the impossibility, of any such scheme. We cannot, of course, in this place stop to prove what is almost an axiom of railway economics. Fifty years ago the idea was broached in England and thoroughly overthrown; thirty years later it appeared in Germany and Austria, only to be again disproved; and now it reappears with us, — so little do we learn by experience. The competition of different carriers on the same line was shown to be impracticable and undesirable in the second report of the parliamentary committee of 1839–40; the question of competition between railway companies themselves was settled in Gladstone's committee of 1844.

It is with a sense of relief that we turn to the thoroughly scientific book of Councillor Ulrich on railway rates. When an expert in practical railway administration studies the subject in a scientific way, and with a full knowledge of the literature as well as of the facts, we may feel assured that the result will be good. Ulrich was for years in the railway service, and now lectures on railroad problems in Bonn. The book is divided into three parts — an introduction, a general, and a special part. The special part (pages 173–500) treats of the historical development of railroad charges, and will be of most welcome assistance to the searchers after what actually exists, and the reasons of its existence. It is the only complete collocation of European railroad tariffs that we know. Of more purely scientific interest is the general part (pages 27–173) where the underlying principles are discussed. Ulrich distinguishes between the private economic (*privatwirthschaftlichen*) and the public economic (*gemeinwirthschaftlichen*) principles, according as the railroads are in the hands of private corporations or of the state; for he thinks that in fact the private railroads look chiefly to their own dividends, while the state railroads regard primarily the public welfare. Starting from this assumption, Ulrich explains that in private railway tariffs the cost of service constitutes only the minimum limit, while the maximum limit is fixed by the value of the transportation to the purchaser. Going into the discussion of the cost of service, he calculates that the permanent element (that which does not increase proportionally to the traffic) includes the fixed charges plus one-half the operating expenses; *i.e.*, about 75 per cent of the whole. In an abstruse but able argument he shows how this fact,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

taken in conjunction with the principle that fixes the maximum limit, necessarily creates the two chief characteristics of railway rates — the principle of value (or, as we would say, charging what the traffic will bear) and the principle of differential tariffs (or, in our parlance, local discriminations). Ulrich follows Cohn in the idea that charging what the traffic will bear is simply an application, in another sphere, of the principle of taxation according to ability. And this, we may say in passing, is a sufficient refutation of the idea lately advanced by Professor Hunter in England (and which is upheld by the anti-monopoly league here) that rates must be based on cost of service. Messrs. Fink, Chanute, Blanchard, *etc.*, have a valuable ally in Commissioner Ulrich.

In the chapter on differential tariffs, the questions of classification and local discrimination are thoroughly discussed, although perhaps too little attention is paid to the *pro rata* and short-haul laws. The United States come in for their share of caustic criticism on account of personal discriminations and instability of rates. Much stress is laid on the legitimacy, in certain cases, of special rates and rebates, provided they be not secret drawbacks. Although Ulrich upholds the necessity and justifiability of all these principles, — and this forms the most valuable part of the book for American students, — yet the difficulty of applying the principles correctly in the case of private corporations leads him to discard the whole system and to put in its stead the "public economic" principles of state railways. This is of course natural in a German official. The advantages of such a system appear to Ulrich to be greater equality, greater stability, greater simplicity, and greater publicity. The system would consist in an approximation to the principle of tolls (*Gebührenprincip*), although he confesses that such a principle cannot yet be fully carried out, and that the private economic principles of differential rates and discrimination must still, within certain limits, be followed. Attention is drawn to the car-load tariff as the legitimate and logical outcome of the public economic principles. A weak point, however, is the defence of equal mileage rates — an idea that also cropped out in the Cullom testimony. Exception may be taken to this as well as to the patent unfairness of assuming that the evils of private competitive railroad management can only be cured by universal consolidation; *i.e.*, by state ownership. Ulrich lives in a country where the conditions are most favorable for state management, and views perfectly valid there may be utterly inapplicable to us. But allowance being made for these minor defects, the work is a most valuable one. It contains the first comprehensive view of the purely economic results of state *versus* private administration; and although the conclusions are not in accord either with those of Foucher de Careil in 1878, of Le

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Hardy de Beaulieu in 1880, or of Brioschi and Genala in the Italian *Relazione* of 1881, they deserve respectful attention and study. Ulrich's book is by all means the best work on the subject that has hitherto appeared.

Appeal to a public of quite another nature is made in Swann's *An Investor's Notes on American Railroads*. Mr. Swann makes no pretence at completeness; he aspires simply to treat of that very limited aspect of the railroad problem which affects the interests of the investor. What the chapter on Fair and Free Trade, however, at the beginning, has to do with the subject, is not very clear. The book discloses an intimate acquaintance with the often rather unsavory Wall-Street methods, and gives to the uninitiated a good idea of "control" of stocks, railway reorganization, "corners," receivers' certificates, proxies, *etc.* Many of the chapters are mere hints, and thus do not call for criticism. But questions of a wider interest are also casually treated, such as pools, parallel lines, state control, and others. Of these discussions, perhaps the most important is that on Railroad Commissions. Mr. Swann has an antipathy to commissions, especially to those which attempt to regulate too much. "Amateur dry-nursing" by the state, he thinks, will impair business and increase expenditure. In so far as this antipathy is based on the Granger movement and its drastic methods, it is well founded; but it cannot be expected that a work which avowedly explains only the interests of the investor, can at the same time adequately note the demands of the community at large. We hear a little too much of "vested interests" and "confiscation," too much of the rights and too little of the duties of railway corporations. The book is pleasantly and cleverly written, and in so far as it is meant to inform prospective or actual investors of the facts which tend to affect their holdings, it is a success. But the exclusively investor's point of view presents of course only one side of the problem, and the reader must be warned not to accept the results as applicable to the economics of railroads in general.

EDWIN R. A. SELIGMAN.

The Limits of Individual Liberty: An Essay. By FRANCIS C. MONTAGUE. Rivingtons, 1885.

This does not profess to be a philosophical treatment of the subject. It is, nevertheless, a scientific discussion; and one is somewhat puzzled by finding the author's statement in the preface, "It cannot assist the scientific inquirer," followed by the declaration on page 18, "My next endeavor will be to trace the bearing upon any scientific conception of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

political and social freedom of the vast stock of fresh scientific knowledge amassed in our own age."

I am compelled to say that in so far as this essay is historical, it is inaccurate and superficial; and in so far as it is scientific and expository, it is commonplace and marked by what some might characterize as a feminine loquacity.

We are told that the political school of Hobbes and Locke are identified with the English Revolution (page 37), which, in so far as the former is concerned, must be regarded as at least a curious judgment. Of Bentham's philosophical views the author speaks contemptuously, and among other things says, "A citizen such as he conceives will be capable of very little devotion for any state" (page 40). His travesty of Mr. Spencer's doctrine of evolution does not surprise us when we read that "Biology must regard man as a physical agent solely. English psychology from first to last has never regarded him in any other light. It takes account only of the natural and unconscious" (page 45).

After an introduction, in which he traces the development of the idea of individual freedom through various reactions, the author notices the views held at different times by philosophers and political economists. Speaking of individuality, he says: "Such individuality as does exist is not most plentiful in the freest countries. Germany can still boast of two or three extraordinary individuals; the United States cannot show one" (page 4). If the author were here to be taken seriously, one might suggest that there is at least one "extraordinary individual" in England.

The greater part of the book is occupied in attempt to show that society is an organism acting on its members, and acted on by them. The author makes a distinction between society and other organizations in the fact that its members are in possession of intellect. His treatment (chapter vi.) of the functions of the state is extremely confused in its main outline, and is made unnecessarily long by trite propositions, which are like interpolations from some "proverbial philosophy"; *e.g.*, "The blind, unconscious individual is the product of the blind, unconscious society." "Security of life and property is the first condition of progress."

It is, he says, the function of the state to provide for the public defence, to keep order within its own dominions, to educate its citizens. "In countries like our own the state should endeavor, by a cautiously graduated taxation and by judicious rules of inheritance, to mitigate the inequality of fortunes." It should pass poor-laws, control elementary education, build theatres, and encourage the cultivation of music. Mr. Montague finds that "the endowment of religion by the state is in no

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sense absurd." He thinks that a man is no more justified in complaining of having to support a state religion than of having to contribute to board schools or art schools. But he appears to confuse in his whole discussion what is legally right with what is morally right. When, however, — to speak figuratively, — he ascends the rostrum or pulpit, his remarks are eloquent and suggestive. "To be overruled by the pitiless forces of chance and passion — this is slavery, this is the extinction of individuality; to be educated by the best intelligence and the best morality of our age — this is freedom, this is life. Life is so brief, yet life might be so full" (page 177). One is disposed to believe that there is some truth in that.

Like a great many theoretical writers about government, the author takes a view of society at variance with facts. The process of legislation should perhaps be governed by logic and rules of morality, and even æsthetic ideals; but the theories which the author finds prevalent in Great Britain have little place here. Our way of looking at politics is, at least theoretically, that of the Greek and Roman publicists, if the author is right when he says: "In their eyes the state was a corporation; citizenship, a privilege; personal freedom, the right to discharge public duty."

ARCHIBALD ALEXANDER.

The Patriarchal Theory. Based on the Papers of the late JOHN FERGUSON MCLENNAN. Edited and completed by DONALD MCLENNAN, Barrister-at-law. London, Macmillan & Co., 1885. — 8vo, xiii, 335 pp.

Mr. J. F. McLennan first set forth his views upon the origin and evolution of marriage and kinship more than twenty years ago, in an essay upon *Primitive Marriage*. These views, his brother tells us, "were, on the whole, confirmed and enlarged by further study"; and it was his intention "to undertake a general work upon the structure of the earliest human societies." But, before attempting that work, he felt it necessary to "clear out of the way" certain widely received opinions in regard to the primitive household which "seemed to oppose an obstacle to the proper appreciation of his constructive argument." Of these opinions Sir Henry Maine is, among English-speaking men, the most prominent champion; and the work upon which Mr. J. F. McLennan was engaged at the time of his death was meant to combat and overthrow the patriarchal theory as presented by Maine. This is the book which Mr. Donald McLennan has completed and published. Seven out of the first ten chapters, and at least one of the last nine, had been put into substantially their present shape by Mr. J. F. McLennan;

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the remaining eleven were worked out by Mr. Donald McLennan upon hints contained in his brother's papers. For these he wishes to be held responsible.

It is not my intention here to examine or criticise the positive theories of the McLennans. As far as they were set forth in Mr. J. F. McLennan's earlier writings, they have already been subjected to a great amount of discussion.[1] But it will perhaps be of interest to formulate and examine the McLennans' criticisms of Maine's theories. Issue is joined upon the following points:

(1) As to the historic priority of monandrous marriage, marital and paternal authority, and agnatic relationship. Here, I think, the McLennans have the best of the argument. They find "traces" of primitive polyandry and *Mutterrecht* (relationship exclusively through the female) in quite as many instances as Maine finds "traces" of *patria potestas* and *agnatio*.

(2) As to the extent of the husband's and father's powers. The McLennans find restrictions everywhere, — religious, moral, or legal; and wherever they find restrictions they at once assert that they have disproved the existence of *manus* and *patria potestas*. Such reasoning as this would prove that neither power existed at Rome, for at Rome also there were restrictions upon the house-lord's power, even in the royal period. The theory that his power was there originally unlimited rests upon the assumption that a general power with special limitations is probably older than the limitations.

(3) The McLennans assert that the duration of *patria potestas* through the father's entire life, and the extension of his power over the grandchildren, *etc.*, cannot be shown to be a general institution. I think they are right on this point. The Romans themselves regarded their law as anomalous in this respect, and the *emancipatio jure Saxonico* seems as old as any institution of German law.

(4) The McLennans assert that an *exclusively* agnatic system of kinship cannot be proven to have existed in any important branch of the Aryan family save the Latin. The evidence marshalled on this point is very strong.

(5) They attack Maine's theory that agnation implies *patria potestas* and is developed out of it. I confess I do not understand their reasoning upon this point, unless by *patria potestas* they mean an unlimited and life-long right of the house-lord over all descendants in the male line. They themselves admit that relationship cannot be traced in the male line until the husband gets a right of some sort to his wife (or wives) and thus incidentally to their issue; and they admit that this

[1] See, for example, Spencer's Principles of Sociology, part iii. ch. iv. *et seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

right was established in the earliest period by wife-capture, and later by wife-purchase. But these are methods of gaining the most unlimited of rights — that of ownership.

Great stress is laid upon the fact that at Rome *patria potestas* survived *agnatio*, and it is asserted that if agnation were the derivative and dependent institution, it should have lasted as long as the original and principal institution. I do not see the cogency of the argument. Legal history is full of cases where derivative institutions survive those from which they are derived, and *vice versa*. But there is an antecedent weakness in the premises of the argument. Agnation *did* last as long as *patria potestas* at Rome, not as an exclusive system of kinship, but as a legally superior system.

One of the incidental conclusions reached by Mr. David McLennan is that agnation was not the general system of Roman relationship in the royal period, but the system of the patricians only. He evidently is not aware that the same theory has recently been formulated by a German savant,[1] and furnished with a much larger apparatus of evidence than Mr. McLennan brings to its support.

I think that this book will be of service in "clearing out of the way" some of the overstatements and exaggerations of the patriarchal theory as presented by Sir Henry Maine. But I do not think that it seriously shakes the theory as held by scholars generally.

MUNROE SMITH.

De l'Empire Allemand, sa constitution, son administration. Par C. MORHAIN, Sous-intendant militaire. Paris, Berger-Levrault et C^ie^, 1886. — Large 8vo, x, 455 pp.

Successful attempts at federal government are so rare in the political world that the study of perhaps the most powerful confederation of the present — one which has attained its position in an incredibly short space of time — is of the highest interest to the student of public affairs. On this account, if on no other, any book on the administrative system of the German empire must receive a warm welcome and attract more or less attention. Some such book, written in a language more commonly understood than German, has for a long time been needed; and this need it is the purpose of M. Morhain's work to supply.

It is to be regretted, however, that a book for which so wide a field of usefulness is open, is so faulty in its method of arrangement. We find no apparent system at all. The various chapters are all jumbled

[1] Bernhöft, Die Römische Königszeit. Stuttgart, Ferd. Enker, 1882.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

together with no idea of the inter-relations of the different subjects. The author's bent of mind has naturally led him to devote to the military administration what to the average American reader would seem a disproportionate space. The same criticism may be made of the chapter on justice, in which too much space is given to questions of civil and criminal procedure for a book on administrative law. Again, the aim of the author has been the collection of details and the enumeration of facts rather than the statement of general principles. Nowhere outside of the preface, which is the most interesting part of the book, does M. Morhain seem to seize the general characteristics of German federal government and administration. There, however, its exact position and tendencies are accurately set forth.

> Imperial legislation [he says] has spread a vast net over Germany, in the meshes of which the single states move; but each day the meshes are being drawn closer together and limit more and more the individual movement of the German local sovereignties. . . . Their autonomy is being gradually reduced to matters relating to local police, public charity, and the administration of highways; in a word, to purely local matters.

This development was well expressed by Treitschke when he spoke of Germany as a *werdender Einheitstaat.*

It is remarkable that this first attempt of a Frenchman to examine carefully the institutions of his neighbors "au dela du Rhin," should be so full of details and facts and so wanting in generalizations. For it has often been said that Frenchmen deduced principles from details collected by the researches of Germans. But the fault is not a bad one in this case, as the book is intended for the student rather than the general reader and offers a mass of valuable material hitherto inaccessible to the majority of our students.

FRANK J. GOODNOW.

American Statute Law. An analytical and compared Digest of the Constitutions and Civil Public Statutes of all the States and Territories relating to Persons and Property in force January 1, 1886. By FREDERIC J. STIMSON. Boston, Charles C. Soule, 1886. — Lex. 8vo, xl, 779 pp.

Mr. Stimson has rendered a great service both to practising lawyers and to students of our legal and political development. He deserves from both classes the warmer gratitude because his digest represents so much labor of a tedious and ungrateful kind.

He tells us in his preface that the statutes of the states and territories, in their latest revisions, fill 235 octavo volumes, and that to embody their

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

provisions, "or even any considerable portion of them, in one or two volumes of manageable size, seemed at the first sight a hopeless undertaking." But he does not attempt to codify all the statutory law. At least half of the law in each state is omitted as of purely local interest. Nor does he undertake to collate the criminal statutes, nor those regulating the details of procedure. And on examination he finds that the residue of our public and private law is less heterogeneous than might have been expected. The legislations of our states and territories fall into a limited number of groups, one or more states in each group furnishing the models upon which the laws of the others are framed. In many cases, therefore, common rules prevail in the entire group. By confining the digest for the present to constitutional and private law, and by stating common rules once for all states enacting them, the author has been able to reduce a great part of our statute law to the compass of a single volume about one-third the size of Webster's unabridged dictionary.

The arrangement adopted is a good one. The law is classified, in the main, according to the character of the relations which it governs. Public law is separated from private, and in the latter we find the four great natural groups of real and personal property, family relations, and succession or inheritance. It seems to me, however, a matter for regret that this natural division is to a certain extent obscured by the peculiar terminology borrowed from Holland. I do not believe that jurists generally will ever acquiesce in a nomenclature which stamps the law of real property and of inheritance as "normal" and that of the family as "abnormal."

Again, it may be noticed that the fundamental distinction of public and private law is not carried out in all the details of the present volume. The author's Constitutional Law is simply the law of the constitutions. It does not contain all the provisions which relate to the organization of our commonwealth governments; those which rest upon ordinary statutes must be sought elsewhere. On the other hand, his Constitutional Law contains many provisions of administrative law, parliamentary procedure, and private law, *viz.*, all that are in the state constitutions, and our state constitutions are notoriously full of such provisions. For studying the tendencies of American law, there is a certain advantage in finding all these provisions in one place; the student is able to follow more easily the peculiar lines of development which the law of our constitutions is taking. But for the practising lawyer it would seem more convenient to find all the provisions which govern a special legal relation in one place. It would be easy to adopt a notation by which the rules contained in the constitutions could be distinguished from those contained in single statutes or in codes.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The principal value of such a work as this, of course, depends upon its accuracy, and the accuracy of such a work can be determined only by actual use. One point suggests itself immediately. The author has been obliged, in carrying out his plan, to "recast" the provisions of the various laws in his own words. Any such recasting, however slight, is obviously of the nature of construction or interpretation, and the interpretation of law by a private person, however accurate it may be, is not authoritative. The careful lawyer, engaged in an important case, will, of course, be obliged to go back to the original statutes; but this necessity will not lessen the value of Mr. Stimson's digest as an index.

MUNROE SMITH.

Lectures on International Law in Time of Peace. By JOHN NORTON POMEROY. Edited by Theodore S. Woolsey, Professor of International Law in the Yale Law School. Boston, Houghton, Mifflin, & Co., 1886. — xvi, 480 pp.

An Introduction to the Constitutional Law of the United States. By JOHN NORTON POMEROY. Ninth edition, revised and enlarged by Edmund H. Bennett, LL.D., Dean of the Boston University Law School. Boston, Houghton, Mifflin, & Co., 1886. — xxxviii, 708 pp.

There is a strong tendency prevalent in America to-day to "make" law-books. In place of one great treatise by Kent, or two by Story, we find certain authors producing works on legal subjects at a rate that must frighten those who are obliged to rely upon them as authorities. One writer gives us seven volumes in as many years and upon as many different subjects; another writes upon "Mortgages" and "Real Property," and immediately branches off into the "Law of Corporations." Treatises thus produced must be little more than collections of cases, or digests.

It is needless to say that Professor Pomeroy's works do not belong to this class of law-books. Originally delivered as lectures to classes in two law schools, the *International Law* is a concise, direct, and admirably stated *résumé* of the rules in force at the time of their delivery; supplemented at almost every page by the views of a clear and advanced thinker, as well upon what was, as upon what ought to be, the condition of the rules governing the intercourse between nations. These views, as Professor Woolsey well says in his preface, were sufficiently far in advance of the time in which they were formed to be of value to-day not only as authority, but also, in some cases, as a guide to the future.

The *Constitutional Law* seems to be more tinctured with the feeling of the time in which it was written than the other work. Professor Pom-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

eroy was a nationalist; and even so broad a mind as his could scarcely assume a perfectly unbiassed position, in the years 1866–67, upon the great question of national sovereignty. His statement of the theory of Hamilton is the best, the most logical, that I have seen. It is very much stronger than his statement of the theory of Calhoun; and he fails to point out, in its proper place, the inherent weakness of the third theory of sovereignty which he formulates as occupying the middle ground between these two extremes; for the doctrine that the commonwealths, once possessing sovereignty, forever surrendered that sovereignty (or part of it) to the nation, should not have been stated without immediately considering the accepted opinion that a state can never part with its sovereignty "absolutely and irrevocably." To state, in a foot-note to a subsequent chapter on "The Period of the Confederation," that "there can be no obligatory promise, when this promise is of suicide," is not sufficient.

But if the bias I have suggested exists, it is a bias that the development of history is justifying, and it does not affect the value of the detailed examination of the constitution itself. In this part of the work the author has made a more logical and admirable use of case-law than I have seen elsewhere; developing his principles by citations, and never using a citation except to develop a principle. The editor has been less fortunate; and the mass of case-law inserted by him is hardly in keeping with the general character of the treatise.

Several omissions are noticeable. No mention is made of the question as to the constitutionality of the consular courts in the East; and the effect of the provision in our constitution that treaties shall be the supreme law of the land is dismissed in the one work (*International Law*, page 374) with a reference to the other; and is there very briefly and imperfectly discussed (*Constitutional Law*, page 568). Nor is there any discussion of the nature and effect of reciprocity or customs treaties, of their enforceability, or of the effect of the various forms of the "most favored nation" clause; questions which have recently grown into great importance. These defects are attributable rather to the editors than to the author, for these questions have risen into importance since the works were written.

The books themselves are admirably gotten up, the indices are good, and there is no padding.

HARRY HARMON NEILL.

The Quarterly Journal of Economics. Published for Harvard University. Volume I., Number 1. Boston, Geo. H. Ellis, 1886.—8vo, 135 pp.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Giornale degli Economisti. Diretto dal Dott. ALBERTO ZORLI. Volume I., Fasc. 1–6. Bologna, Fava e Garagnani, 1886.

The Quarterly Journal of Economics, we are told by the editors, is established as an aid to investigators and students. The first number amply fulfils the promise set forth in the circular. Each of the leading articles is timely: one on general theory, one on monopolies, and one on silver. Under the title "The Reaction in Political Economy," Professor Dunbar gives a temperate account of the new movement whose influence has been making itself felt on this side of the Atlantic, as well as in continental Europe. He holds that the new movement is not so much a revolution as, in fact, a development of the old science; and takes pains to show that the orthodox economics does not necessarily connote a belief in absolute *laissez faire*. A point prominently brought forward, and one that is especially emphasized by Wagner in an article translated in the appendix, is the statement that the new method is not and cannot be exclusively inductive. Professor Dunbar, while evidently leaning a little to the old, is yet eminently fair and moderate in his criticisms of the new, and thus paves the way for a complete reconciliation. In fact, it may be said that, with the exception of a few heated extremists on each side, the differences of the economists of the present day are verbal rather than material, and that notwithstanding the arguments about deduction and induction, *laissez faire* and state-action, ethics and competition, the concrete questions are apt to be discussed and decided in about the same manner. Professor Hadley, in an article on "Private Monopolies and Public Rights," gives an interesting *résumé* of the history of railway legislation, and points out the direction which it is taking at the present day. He elaborates the idea which, we believe, was first advanced by Kleinwächter in his work on industrial combinations, that the movement toward railroad consolidation and the formation of pools is simply a part of the greater movement characteristic of all modern industrial undertakings, and on that account undeserving of the indiscriminate abuse heaped upon it by ignorant opponents. The implication is that state supervision of some kind is as applicable to other industrial corporations as it is to railways. Hon. Dana Horton, in "Silver before Congress in 1886," returns to the charge in favor of international bimetallism with all his wonted energy, and brings the history of the contest down to the end of the last session. Other features of the *Journal* are the notes and memoranda, an interesting letter from Paris by Arthur Mangin, and an appendix which contains a translation of Wagner's recent remarkable article on the present state of political economy. Not the least valuable department is the very full list of recent publications in the four leading languages, — a list

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which will be indispensable to all students who do not take Conrad's *Jahrbücher*. Taking it all in all, the *Journal of Economics* is a credit to American scholarship and deserves a warm welcome.

Of a similar character is the new Italian review, *Giornale degli Economisti*, which is published every two months. The last few years have witnessed an amazing increase in both the quantity and the quality of the work accomplished by Italian economists. It may be said with truth that in no country in the world, with the exception of Germany, is there such a numerous and able set of economic writers as in modern Italy. There, also, a reaction has set in against the old political economy — a reaction which resulted in an economic association formed in 1875 at Milan, by Luzzati, Lampertico, Scialoja, and others, and in the *Giornale degli Economisti*, which was to represent their views. This, however, ceased to appear after a short time, and it is only a few months ago that what is practically a new periodical under the old name was inaugurated by Zorli, who gained his reputation in 1881 by the publication of a remarkable work on the labor question: *Emancipazione economica della classe operaia*. The contributors to the *Giornale* are of course mainly Italian, although we find an article by de Laveleye on silver, and by Eheberg on the German tariff. Among the most noteworthy essays, we may mention those by Cognetti de Martiis, on economics as an autonomous science; by Lampertico, on natural laws; by Gobbi, on the labor question; by Loria, on prison labor; by Ferraris, on statistics; by Rosmini, on the lottery system. There is also in each number a valuable review of the latest legislation and of economic phenomena, and a bibliography which takes in the whole world. A department of reviews of new books and magazine articles is likewise added, and it is gratifying to note that attention is paid to the movement of economic science in America. In fact, it has become a necessity for the modern scientists to be as cosmopolitan in their knowledge as those of the last generation, at least in France and England, were narrow and insular. That both Italy and America should have found occasion to inaugurate economic journals of a strictly scientific character, and should at the same time take ample notice of each other, is certainly a matter of congratulation and augurs well for the future of the science.

EDWIN R. A. SELIGMAN.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED